Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home *and* 1199 SEIU United Healthcare Workers East. Cases 02–CA–177329, 02–CA–193189, 02–CA–198370, 02–CA–206253, and 02–CA–210245

February 11, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On December 12, 2018, Administrative Law Judge Benjamin W. Green issued the attached decision. Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home (the Respondent) filed exceptions and a supporting brief. The General Counsel and 1199 SEIU United Healthcare Workers East (the Union) each filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

For the reasons discussed by the judge, we affirm the judge's findings that the Respondent violated Section 8(a)(1) by promulgating and maintaining a rule prohibiting employees from engaging in union business on its property or during work hours; Section 8(a)(3) and (1) by discharging Catherine Thomas for supporting the Union and by reducing unit employees' annual merit wage increases because those employees selected the Union as their representative;[5] and Section 8(a)(5) and (1) by failing and refusing to provide the Union with certain relevant information that it requested on January 6 and April 19, 2016, and by refusing to meet with the Union at reasonable times to bargain. Additionally, for the reasons discussed by the judge, we affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) by engaging in overall bad-faith bargaining. Finally, for the reasons discussed by the judge and the additional reasons discussed below, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally reducing unit employees' annual merit wage increases.

In determining whether the Respondent violated Section 8(a)(5) by unilaterally reducing the unit employees' annual merit wage increases, the threshold issue is whether the Respondent's merit wage program was an established term and condition of employment. The Board has long held that "a merit wage program will be found to be a term and condition of employment when it is an 'established practice . . . regularly expected by the employees.'" *Rural/Metro Medical Services*, 327 NLRB 49, 51 (1998) (quoting *Daily News of Los Angeles*, 315 NLRB 1236, 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997)); see also *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 4 (2018), enfd. in relevant part 944 F.3d 294 (D.C. Cir. 2019). "Factors relevant to this determination include 'the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.'" *United Rentals*, 349 NLRB 853, 854 (2007) (quoting *Rural/Metro Medical*, supra at 51).[6]

[1] No party has excepted to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide to the Union in a timely manner relevant information requested by the Union on January 6, 2016. Further, no party has excepted to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining a rule against harassment and spreading false rumors and Sec. 8(a)(5) and (1) by failing to provide the Union with requested copies of cost reports that the Respondent submitted to Medicaid or any other public entity or program for reimbursement.

[2] Because we affirm the judge's dismissal of the allegation that the Respondent violated the Act by engaging in overall bad-faith bargaining, we find it unnecessary to pass on whether the judge abused his discretion in granting the General Counsel's motion to amend the complaint to clarify that allegation.

[3] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

At certain points in his decision, the judge inadvertently stated that the election and the Union's subsequent certification occurred in December 2016 and that the Respondent reduced unit employees' merit wage increases beginning in January 2017. As the judge correctly stated at many other points in his decision, the election and the Union's certification occurred on December 4 and 14, 2015, respectively, and the Respondent reduced unit employees' merit wage increases beginning in January 2016. We have corrected those errors, which have not affected our disposition of this case.

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[5] In affirming the judge's finding of this violation, we do not rely on his speculation that the Respondent's discriminatory reduction of the employees' merit wage increases may have been a bargaining tactic.

[6] Those factors are relevant to a determination of whether an employer's *merit wage program* was an established term and condition of employment, but they are not necessarily controlling in determining whether an employer has developed a past practice in other contexts. See, e.g., *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145, slip op at 3–4 (2019) (finding, in the context of determining whether an employer had

Here, since acquiring ownership of the Putnam Ridge Nursing Home facility (Putnam Ridge) around 2010, the Respondent has provided merit wage increases to unit employees each year on or near their employment anniversaries, the amounts of which are based on the employees' annual performance appraisals. The Respondent annually conducts a performance appraisal for each unit employee around his or her employment anniversary date and assigns the employee an overall rating of "Outstanding," "Very Good," "Good," "Improvement Needed," or "Unsatisfactory." The record evidence supports the judge's finding that prior to the Union's certification on December 14, 2015, the Respondent provided employees who received overall ratings of Outstanding, Very Good, and Good with merit wage increases of 2.5 percent, 2.25 percent, and 2 percent, respectively (the precertification formula). The record also supports the judge's finding that since January 2016, the Respondent has reduced the merit wage increases for employees who receive overall ratings of Outstanding, Very Good, and Good to 1.75 percent, 1.5 percent, and 1.25 percent, respectively.

The Respondent argues that it did not have an established practice of annually providing unit employees with merit wage increases based on the precertification formula because the employees did not receive merit wage increases for 3 years prior to 2010. However, as stated above, the Respondent did not acquire ownership of Putnam Ridge until 2010. The failure by the prior owner of Putnam Ridge to provide merit wage increases to employees would not have affected whether unit employees regularly expected *the Respondent* to provide such increases. What is important is that from the time that the Respondent acquired ownership of Putnam Ridge until the unit employees selected the Union as their exclusive collective-bargaining representative, the Respondent annually provided unit employees with merit wage increases based on the precertification formula. Thus, we agree with the judge that the Respondent's argument lacks merit.

The Respondent further argues that it did not have an established practice of annually providing unit employees with merit wage increases based on the precertification formula because in 2013 and 2015 it provided general wage adjustments instead of merit wage increases. For the reasons that follow, we agree with the judge that this argument lacks merit as well.

In 2013, the Respondent provided many, but not all, unit employees with general wage adjustments instead of merit wage increases.[7] However, employees who did not receive general wage adjustments received merit wage increases based on the precertification formula as usual. Moreover, in a January 15, 2013 memorandum announcing and explaining the reason for the general wage adjustments, the Respondent acknowledged that it had "instituted a policy to review all of [its] employees on an annual basis and provide merit increases," adding that it had "realized that these increases were not enough, and failed to address the decisions by prior ownership not to provide increases for three (3) years." Thus, although the Respondent did not provide merit wage increases to some unit employees in 2013, nothing in the January 15 memo suggested that those employees would not receive merit wage increases in the future. Instead, the memo affirmed that the Respondent had adopted an annual merit wage increase program but explained the particular circumstances that prompted it to give some employees general wage adjustments instead of merit wage increases that year. See *Bryant & Stratton Business Institute v. NLRB*, 140 F.3d 169, 180–182 (2d Cir. 1998) (finding that the employer's merit wage program was an established term and condition of employment even though the employer had discretion to forgo granting merit wage increases based on economic conditions and did so on one occasion because "[t]he exception does not eradicate the norm"); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1264 (1997) ("The fact that employees on occasion received wage increases that were not tied to their probationary or anniversary dates is insufficient to convince us that the [employer] did not follow a settled practice respecting probationary and anniversary increases."), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999).

In 2015, the Respondent provided unit CNAs with general wage adjustments to make their wage rates more competitive with CNAs at other nursing homes in the area. However, it also provided many of those CNAs, and unit employees in all other classifications, with merit wage increases based on the precertification formula. Once again, the Respondent did not indicate in any way that the employees who received general wage adjustments would not receive merit wage increases in the future.

In sum, at the time of the Union's certification, the Respondent's merit wage program was an established term and condition of employment because it had been in place since the Respondent acquired ownership of Putnam Ridge, and the Respondent annually provided unit employees with merit wage increases around their employment anniversaries and used their performance appraisals

a past practice of unilaterally selling sales routes, that an employer's unilateral actions do not necessarily have to occur at "set intervals" or be taken pursuant to "consistent criteria" to qualify as a past practice, and that the respondent's unilateral sales of its routes established a past practice based on "the overall frequency and number" of such sales—51 in all—"over a span of 17 years").

[7] The general wage adjustments were larger than the merit wage increases that the employees would have otherwise received.

to determine whether they received merit wage increases and the amounts thereof.[8] Therefore, the Respondent was not privileged to unilaterally change its merit wage program once the unit employees selected the Union as their representative. See *United Rentals*, supra, 349 NLRB at 854 ("[W]here a past practice of adjusting wages constitutes a term or condition of employment, the unilateral discontinuance of that practice violates Sec[.] 8(a)(5)."). As discussed above, since January 2016, the Respondent has provided unit employees who have received overall ratings of Outstanding, Very Good, and Good with merit wage increases of only 1.75 percent, 1.5 percent, and 1.25 percent, respectively (the postcertification formula). Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally reducing unit employees' merit wage increases beginning in January 2016. See *Beverly Manor Nursing Home*, 325 NLRB 598, 598 (1998) (finding that the employer violated Sec. 8(a)(5) by unilaterally reducing the maximum merit wage increase from 4 percent to 3 percent), enfd. 174 F.3d 13 (1st Cir. 1999); *Southeastern Michigan Gas Co.*, 198 NLRB 1221, 1221–1223 (1972) (finding that the employer violated Sec. 8(a)(5) by unilaterally discontinuing its practice of granting 5-percent wage increases to employees every 6 months if they received a satisfactory review), enfd. 485 F.3d 1239 (6th Cir. 1973).[9]

ORDER

The National Labor Relations Board orders that the Respondent, Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, reducing the merit wage increases provided to, or otherwise discriminating against employees for supporting 1199 SEIU United Healthcare Workers East (the Union) or any other labor organization.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) Failing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Respondent's unit employees by refusing to meet with the Union at reasonable times to engage in collective bargaining.

(d) Refusing to bargain collectively with the Union by failing and refusing to furnish, and failing to furnish in a timely manner, requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) Promulgating and maintaining an overly broad rule that prohibits employees from engaging in union business on company property or during work hours.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Catherine Thomas full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Catherine Thomas whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Included: All full-time and regular part-time employees, including LPNs, CNAs, receptionists, unit secretaries, dietary aides, housekeeping aides, rehab aides, rehab techs, restorative aides, laundry aides, maintenance workers, activities leads/aides, and hospitality aides, including those per diem employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election

[8] The present case is distinguishable from *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235 (D.C. Cir. 2011), denying enf. 355 NLRB 1222 (2010). In that case, the court concluded that the employer did not have an established practice of providing an across-the-board wage increase each July because the employer did not use any particular criteria to determine whether to give an across-the-board wage increase or the amounts of such increases and did not grant such increases in 3 of the 5 years immediately preceding the alleged unilateral change (and 9 of the previous 15 years overall). See id. at 1238–1240. Here, as discussed above, the Respondent used fixed criteria to determine whether to grant merit wage increases and the amounts of such increases and provided merit wage increases to at least some unit employees every year after it acquired ownership of Putnam Ridge.

[9] For the reasons discussed by the judge, we agree with his rejection of the Respondent's argument that it lawfully implemented the postcertification formula upon a good-faith impasse.

Excluded: All other employees, all employees in the therapy department, RNs, cooks, professional employees, office clerical employees, guards and supervisors as defined in the Act

(e) Rescind the reduction of unit employees' annual merit wage increases.

(f) Make affected employees whole for any loss of earnings and other benefits suffered as a result of the unilateral and discriminatory reduction of their annual merit wage increases, in the manner set forth in the remedy section of the decision.

(g) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(h) Furnish to the Union in a timely manner the information requested by the Union in paragraphs 1, 2(i), 3, 6, 7, 8, 9, 10, 12, and 17(b)-(k) of its January 6, 2016 information request and in its April 19, 2016 information request.

(i) Rescind the memorandum issued on April 15, 2016, which prohibits employees from engaging in union business on company property or during work hours.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Brewster, New York facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 4, 2015.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification of the Union issued by the Board on December 14, 2015, is extended for a period of 1 year commencing from the date on which the Respondent begins to bargain in good faith with the Union, and that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 11, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you, reduce your merit wage increases, or otherwise discriminate against you for supporting 1199 SEIU United Healthcare Workers East (the Union) or any other labor organization.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT fail to bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees by refusing to meet with the Union at reasonable times to engage in collective bargaining.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish or failing to furnish in a timely manner requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT promulgate and maintain an overly broad rule that prohibits you from engaging in union business on company property or during work hours.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Catherine Thomas full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Catherine Thomas whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Catherine Thomas, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Included: All full-time and regular part-time employees, including LPNs, CNAs, receptionists, unit secretaries, dietary aides, housekeeping aides, rehab aides, rehab techs, restorative aides, laundry aides, maintenance workers, activities leads/aides, and hospitality aides, including those per diem employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election

Excluded: All other employees, all employees in the therapy department, RNs, cooks, professional employees, office clerical employees, guards and supervisors as defined in the Act

WE WILL rescind the reduction of your annual merit wage increases.

WE WILL make affected employees whole for any loss of earnings and other benefits suffered as a result of the unilateral and discriminatory reduction of their annual merit wage increases, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL furnish to the Union in a timely manner the information requested by the Union in paragraphs 1, 2(i), 3, 6, 7, 8, 9, 10, 12, and 17(b)-(k) of its January 6, 2016 information request and in its April 19, 2016 information request.

WE WILL rescind the memorandum issued on April 15, 2016, which prohibits you from engaging in union business on company property or during work hours.

ATLANTICARE MANAGEMENT LLC D/B/A PUTNAM RIDGE NURSING HOME

The Board's decision can be found at www.nlrb.gov/case/02-CA-177329 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Joane Si Ian Wong, Esq., for the General Counsel.
David F. Jasinski, Esq. and *John Heraty, Esq. (Jasinski, P.C.),* for the Respondent.
Katherine H. Hansen, Esq. (Gladstein, Reif & Meginnis), for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. A trial was conducted in this matter on January 8, 9, 10, 19, and February 5, 2018, in New York, New York.[1] The General Counsel contends that Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home (Respondent) violated the Act as follows:[2]

Section 8(a)(5), (3), and (1): Unilaterally reduced the annual wage increases of unit employees and did so because employees elected 1199 SEI United Healthcare Workers East (Union) as their bargaining representative.

Section 8(a)(5) and (1): Failed to provide the Union with requested information, delayed the production to the Union of other requested information, failed to meet and bargain with the Union at reasonable times, and overall bad faith surface bargaining.

Section 8(a)(3) and (1): Discharged Catherine Thomas by ceasing the assignment to Thomas of per diem shifts.

Section 8(a)(1): Promulgated and maintained (1) an overly broad rule forbidding employees from engaging in union business on company property or during work hours and, (2) in response to employees' union activity, an overly broad rule against harassment and spreading false rumors.

In addition to standard remedies, the General Counsel seeks extraordinary remedies of a 12-month extension of the certification year, a bargaining schedule, payment by the Respondent of the Union's bargaining expense, and a make whole remedy for employee negotiators for any earnings lost while attending bargaining sessions.

The Respondent has denied the substantive allegations.

For the reasons discussed herein, I find that the Respondent largely engaged in the unfair labor practices described above. I do not find that the Respondent violated the Act by failing to furnish the Union with certain cost reports for reimbursement from Medicaid, promulgating and maintaining the rule against harassment and spreading false rumors, and overall bad faith surface bargaining. I will order a *Mar-Jac* remedy extending the certification year for 12 months, but will not order the remainder of the extraordinary remedies sought by the General Counsel.

Posthearing briefs were filed by the General Counsel, the Respondent, and the Union.

On the entire record, including my observation of the demeanor of the witnesses, I make the following findings, conclusions of law, and recommendations.[3]

JURISDICTION

The Respondent is a limited liability company with an office and place of business in Brewster, New York, and has been engaged in operating a nursing home providing inpatient and outpatient medical care. During the 12-month period before the complaint issued, the Respondent derived gross revenues in excess of $100,000, and purchased and received at its Brewster facility goods valued in excess of $5,000 directly from points outside the State of New York. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

FINDINGS OF FACT

The Respondent operates a nursing home and employs employees in various classifications, including licensed practical nurses (LPNs), certified nursing assistants (CNAs), aides, and maintenance workers. These employees work on a full time, part time, or per diem basis. The Respondent also uses personnel agencies to supplement its staff. The Respondent admits that it is less costly and preferable to use its own employees (including per diem employees) than agency employees.

The Respondent's managers include Eric Greenberger, part-owner; Rose Pottinger, administrator; Kathleen Flood, director of nursing; and Louise Perucci, director of human resources. Lita Ferraro is the Respondent's scheduler. David Jasinski is the Respondent's labor counsel. The parties stipulated that Greenberger, Pottinger, Flood, Perucci, Ferraro, and Jasinski are agents of the Respondent as defined in Section 2(13) of the Act.

The Respondent's employee handbook was last revised in February 2015 and includes the following provisions:

> EMPLOYMENT CLASSIFICATIONS
>
> . . .
>
> Per Diem Employees:
>
> Employees who are on-call and do not occupy a regularly scheduled staff position of at least 16 hours per week. Per Diem

[1] The Respondent's answer to the amended complaint was inadvertently excluded from GC Exh. 1. The General Counsel moved in its posthearing brief to include that answer in the record as GC 1-gg, and I grant the General Counsel's motion.

[2] At trial, the General Counsel moved to withdraw paragraph 11 of the amended complaint. I granted the General Counsel's motion and hereby dismiss that allegation.

[3] Testimony contrary to my findings has been discredited.

> Employees will be called for coverage on an as-needed basis. To maintain Per Diem status, Employees most work a minimum of one week-end a month (if needed) and at least two major holidays a year. (One winter holiday and one several holiday.)
>
> SALARY ADMINISTRATION
>
> A formal program of wage administration has been developed and is used by Putnam Ridge to maintain a fair and equitable relationship in the wages paid for the many types of work performed in the Facility. If Putnam Ridge's goal to maintain wage levels for its Employees that are competitive with those paid for similar work by other Employees in our community. The wage and salary program is reviewed on an annual basis.
>
> PERFORMANCE APPRAISALS
>
> Your performance appraisal will be evaluated regularly as a tool to assist you in becoming a more valuable member of our team and to provide you with the feedback that you deserve. A written performance appraisal will be done upon completion of your introductory period and thereafter on an annual basis near your anniversary date. Your department head or supervisor will review the performance appraisal with you and will provide you with an opportunity to discuss any questions you may have regarding any aspect of your employment.

The Respondent has a long history of conducting annual appraisals and granting merit wage increases which correspond with employees' overall appraisal ratings. The appraisals contain numeric scores for various categories and those scores are averaged. The average numeric score then translates to an overall rating of outstanding, very good, good, improvement needed, or unsatisfactory. Historically, employees who received the top three ratings (outstanding, very good, and good) were given certain percentage wage increases with employees receiving a higher pay raise for a better rating and a lower pay raise for a lesser rating. Appraisal ratings below good did not result in a merit wage increase. Thus, annual increases associated with overall appraisal ratings were as follows before January 2016:

Evaluation Rating	% Annual Wage Increase
Outstanding	2.5%
Very Good	2.25%
Good	2%
Below Good	0%

This practice was suspended by the previous owner of the company for a 3-year period prior to the sale of the facility in 2010.

Union Organizing Campaigns, Wage Adjustments, and Thomas Discharge

The Union engaged in organizing campaigns at the Respondent's facility in 2012 and 2015. On October 31, 2012, the union filed its first representation petition for a bargaining unit of CNAs. [JE 1]

In 2012, then full time CNA Catherine Thomas participated in the Union organizing campaign. She was among 10-20 employees who stood in the facility's driveway once a week and talked to employees in support of the Union as they arrived for work. Thomas also spoke in favor of the Union at antiunion meetings which were held by contractors of the Respondent and attended by the Respondent's managers. Thomas testified that she always corrected the person who was speaking on behalf of the Respondent if that person said something untrue about unions.

The October 31, 2012 representation petition was ultimately withdrawn, and no election was conducted in connection with the 2012 campaign. Thomas was not disciplined or otherwise discriminated against by the Respondent as a result of her union activity in 2012.

By memorandum to "all employees" dated January 15, 2013, the Respondent announced the following wage increase:[4]

> When we acquired Putnam Ridge, we inherited a number of challenges and
> issues to address and correct. We have attempted to correct these issues. Not as quickly as we would all like but we are addressing the issues. One of those issues of paramount importance to you and our facility is our commitment to be fair to all of you.
>
> We instituted a policy to review all of our employees on an annual basis and provide merit increases. We realized that these increases were not enough, and failed to address the decisions by the prior ownership not to provide increases for three (3) years. We cannot address or understand their reasoning behind their decisions. We can only look to move forward and that is exactly what we have and will continue to do.
>
> We have reviewed wages and salaries for all of our employees. We are increasing our hire rates and providing an across-the-board increase reflecting the industry and the years of service our employees have given Putnam Ridge. EVERYONE WILL RECEIVE AN INCREASE TO HIS/HPR HOURLY RATES. The increases will range from $0.50 to as high as $1.00 per hour increase in our base rate. These increases will be retroactive to January 1st and will help to attract qualified staff and reward our current staff. You will receive notification of your new rate of pay.
>
> Administration would like to thank all of you for your commitment and look forward to continuing to work for the betterment of Putnam Ridge and continued service to our residents. Thank you.

For the most part, in 2013, the Respondent did not also grant annual merit wage increases to employees. Payroll records reflect that the 2013 wage adjustment resulted in the receipt by employees of significantly higher raises as a percentage of their pay than the merit wage increase (2 percent-2.5percent) they normally received. For example, on January 1, 2013, laundry aide Lucia Cardinas received a 6.08 percent wage adjustment from $9.70 to $10.29.

[4] Payroll records indicate that the wage increase was implemented on January 1, 2013.

In about December 2013, Thomas stopped working for the Respondent on a full-time basis (having found another job) but continued to work as a per diem. Thomas was off 2 days each week from her full-time position and worked for the Respondent on one of those days. She did not have the same days off each week. Therefore, Thomas advised Ferraro up to a week in advance of the date she wanted to work, and Ferraro scheduled her a per diem shift that day. Until December 4, 2015 (discussed at greater length below), the Respondent never denied Thomas a per diem shift on a day she requested.

In about January 2015, Thomas started school and changed her schedule from working one per diem shift a week to one shift every other week.

On October 5, 2015, the Respondent granted all CNAs a wage increase. This wage increase was not described on the record in detail. However, it appears from payroll records that the Respondent increased CNAs' pay, many of whom earned as little as $11.50 per hour, to a minimum wage rate of $13.50 per hour. Certain higher paid CNAs received increases to $14 or $14.10 per hour. Some CNAs also received a merit wage increase in 2015. However, those CNAs were not designated to receive another merit review until 2017 (skipping 2016). As in 2013, the 2015 wage adjustments were significantly higher than the merit wage increases CNAs would normally have received under the Respondent's appraisal rating formula.

On November 6, 2015, the Union filed a representation petition for a unit of non-professional employees, and the parties stipulated to an election on December 4, 2015. The stipulated bargaining unit is as follows:[5]

> Included: All full-time and regular part-time employees, including LPNs, CNAs, receptionists, unit secretaries, dietary aides, housekeeping aides, rehab aides, rehab techs, restorative aides, laundry aides, maintenance workers, activities leads/aides, and hospitality aides, including those per diem employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election
>
> Excluded: All other employees, all employees in the therapy department, RNs, cooks, professional employees, office clerical employees, guards and supervisors as defined in the Act.

The Respondent admittedly opposed the Union's organizing campaign. Greenberger and Pottinger met with and urged employees to vote against representation. The Respondent also mailed flyers to bargaining unit employees urging them to vote "no" against the Union. One flyer from Pottinger stated, in part, "Some people have accused me taking [sic] this Union petition personally. Well, they're right and I cannot help it."

In advance of the election, the Respondent was not contemplating a reduction of employee compensation. In fact, the Respondent was contemplating an increase in compensation to maintain its competitiveness in attracting personnel.

Thomas testified that she was not in the facility much during the 2015 organizing campaign because she was no longer working full time.

A few days before the election, Pottinger called employees, including Thomas, who were working in the Dogwood unit into the unit manager's office. Pottinger talked about the Union and asked the employees to "give her another chance." Thomas responded that this was a "second chance." Pottinger said she was not there during the first organizing campaign so for her it was a first chance. Thomas noted that Greenberger was already given a first chance and for him it was a second chance.

That same day, Thomas asked for a per diem shift on December 4, 2015, so she would not have to come to work just to vote. Ferraro told Thomas the Respondent was fully staffed on December 4, 2015, and did not need her to work that day. This was the first time Thomas had ever been denied a per diem shift she requested.

Dietary Aide Wendy McTighe testified that Greenberger and Pottinger called about five dietary employees into a room for a closed-door meeting before the election. Pottinger told the employees she hoped they would "do the right thing for the facility." Greenberger echoed Pottinger's comment and noted that the Respondent had given the employees a substantial raise.

On December 4, 2015, the election was held and the Union was elected as the bargaining representative of unit employees. A tally of ballots reflects that, of approximately 158 eligible voters, 90 unchallenged ballots were cast in favor of representation and 46 were cast against representation. On December 14, 2015 the Union was certified as the bargaining representative of the unit.

Thomas was among the employees who came to the facility to vote in the election. While she was there, two CNAs told her the Respondent was understaffed that day (with three CNAs per unit instead of four). Prior to trial, the Union subpoenaed daily schedules for the period January 1, 2015 to April 1, 2016. The Respondent only produced such schedules for 2016 (not 2015). These schedules (some of which were entered into evidence) indicate how many CNAs worked in each unit each day. Therefore, the daily schedule for December 4, 2015 could be expected to show how many CNAs worked in each unit that day. Greenberger testified as the Respondent's designated custodian of records. Jasinski testified at trial as well. Upon examination regarding the subpoenaed records, neither Greenberger nor Jasinski were able to explain why the Respondent failed to produce the daily schedules for 2015.[6]

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[5] In its amended answer, the Respondent denied that per diem employees and activities leads were members of the bargaining unit. However, Jasinski testified that the parties stipulated to the appropriateness of the bargaining unit in which the election was conducted and the Union was ultimately certified as the bargaining representatives of that unit on December 14, 2015. I find the stipulated and certified unit, as descried above, to be appropriate.

[6] Accordingly, it is appropriate to consider secondary hearsay in lieu of the missing subpoenaed documents, and I rely on Thomas's hearsay testimony (i.e., she was told by two CNAs that the facility was understaffed) in finding that the facility was understaffed with CNAs on December 4, 2015. *Shamrock Foods Co.*, 366 NLRBB No. 117, fn. 1 (Board Decision) and fn. 61 (ALJ Decision) quoting *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396-397 (2004) enfd. 156 F.Appx. 386 (2nd Cir. 2005).

Shortly after the election was conducted, the Respondent cancelled its annual Christmas party even though it had already paid a deposit on the location where the party was to be held.

On December 13, 2015, activity leader Christine Johnsen-Rega received a merit pay increase of 2.5 percent. Johnsen-Rega was the last employee to receive a merit wage increase above 1.75 percent.

In January 2016, the Respondent changed its practice of providing wage increases of 2 percent, 2.25 percent, and 2.5 percent for overall annual appraisal ratings of good, very good, and outstanding, respectively, to wage increases of 1.25 percent, 1.5 percent, and 1.75 percent for ratings of good, very good, and outstanding, respectively. On January 10, 2016, activity leader Victoria Starr and CNA Patricia Toranzo were the first two employees to receive annual merit wage increases below 2 percent.[7] The Respondent has not, either at trial or in its brief, denied that it changed its merit wage increase formula in the manner described above. Employees, including Starr, testified to the change, and the General Counsel introduced into evidence substantiating evaluations and pay stubs. Additional payroll records further confirm that employees stopped receiving wage increases above 1.75 percent in January 2016.

In December 2015, following the election, Thomas (as usual) notified Ferraro of her availability for work, but Ferraro told Thomas she needed to speak with Flood. Thomas went to Flood's office and asked her about being scheduled. Flood told Thomas the Respondent realized that lots of the per diem employees were not meeting their requirements and that she (Flood) and Pottinger would be having a meeting regarding the matter.[8] Thomas asked Flood to let her know what happens at the meeting.

Thomas did not hear back from Flood regarding the meeting or her schedule. However, Thomas still went to the facility once a month because she had a personal client who lived there.[9] Each time Thomas went to the facility, she asked Flood whether the meeting had been held regarding per diem requirements, but each time Flood told Thomas it had not.

In about February 2016, Thomas called Pottinger and left a voice message indicating that Flood told her she could not be scheduled until a meeting was held about per diem requirements and she (Thomas) had not heard back from Flood regarding the results of that meeting. Pottinger did not return Thomas's call.

Respondent's records, as confirmed by Jasinski at trial, indicate the Respondent continued to use agency CNAs (less desirable than per diem CNAs) even though Thomas was no longer being assigned per diem shifts.

Bargaining

The parties began negotiations for an initial collective-bargaining agreement in March 2016. Bargaining sessions were held on the following dates: March 10, June 1, June 30, August 23, September 20, October 26, November 28, January 10, 2016, February 7, April 5, July 13, August 7, and December 21, 2017.

In advance of negotiations, by letter dated January 6, 2016, from Union contract administrator Abigail Colon to Pottinger (the January 6 request), the Union requested the following information:

> 1. Any and all documents, including but not limited to job descriptions and performance evaluations, that describe the job duties for all bargaining unit positions;
>
> 2. For each employee working in a bargaining unit position, such documents as will show the following:
>
> . . .
>
> d. date and amount of all wage increases and bonuses since January 1, 2011;
>
> . . .
>
> f. number of overtime hours worked on a quarterly basis in 2014 and 2015;
>
> . . .
>
> i. for all employees who have opted out of employer-paid health insurance coverage, the amount of any financial incentive received therefor;
>
> 3. Documents showing or reflecting gross annual payroll for bargaining unit employees for the periods January 1 through December 31, 2014 and January 1 through December 31, 2015;
>
> . . .
>
> 5. Documents, including summary plan descriptions, that show all fringe benefits such as health insurance, disability, pension, profit-sharing, and 401(k) benefits available to or provided to part-time and full-time employees in the bargaining unit;
>
> 6. A copy of the most current payroll roster for bargaining unit employees;
>
> 7. Copies of work schedules, including daily schedules, that show all individuals, including those not on the Employer's payroll, performing bargaining unit work on all nursing units and all shifts for the period January 1, 2014 to the present;
>
> 8. Copies of work schedules, including daily schedules, for all bargaining unit employees not identified in number 7 above for the period July 1, 2015 to the present;
>
> 9. Documents showing or reflecting the ratio of certified nursing assistants to residents on all floors per shifts for the period July 1, 2015 to the present;
>
> . . .
>
> 10. Documents showing or reflecting the total cost to the

[7] The Union contends that LPN Kyleann Donnelly was the first employee to receive, on December 11, 2015, a merit wage increase below 2 percent. However, personnel records contain conflicting dates with one document indicating that Donnelly was evaluated on December 11, 2015 and another document indicating that she was evaluated on February 29, 2016. Regardless, payroll records indicate that Donnelly's merit wage increase was implemented on February 29, 2016 not December 11, 2015.

[8] The Respondent claims that Thomas was not meeting her requirements regarding work on weekends and holidays. However, the record contains no admissible evidence that Thomas failed to work weekends and holidays or was asked by the Respondent to work weekends and holidays. As noted above, the Respondent's daily records for 2015 were not provided in response to subpoenas.

[9] Thomas took this client to run errands and was authorized to do so by Flood.

Employer for each of the following benefits provided to bargaining unit employees during the periods January 1 through December 31, 2014 and January 1 through December 31, 2015: health, dental, vision, life insurance and pension/retirement;

. . .

12. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the Employer from January 1, 2014 to the present;

. . .

16. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2013, 2014, and 2015.

17. Please provide the union with the following documents regarding all health insurance plans offered to bargaining unit employees:

a. A copy of the Summary Plan Description (SPD) and Summary of Benefits and Coverages (SBC), as well as any other documents provided to employees that describe the plan (e.g., upon hire and/or open enrollment period);

b. Documents showing or reflecting the annual or monthly cost of the health, insurance plan(s) to the Employer and share charged to Participating employees for each plan and for each plan coverage option available (i.e., single, family, etc.) and, for each plan, showing:

i. medical cost,
ii. prescription cost,
iii. administrative cost, and
iv. any other costs;

c. Documents showing or reflecting the nature of the insurance program indicating whether fully-insured or self-insured, and:

i. If fully-insured, please provide documents showing or reflecting whether or not the plan is experience-rated, and provide documents from the insurer(s) indicating the basis for arriving at the current premium-rates as well as any premium rates for the next plan year (if such have been provided.);
ii. If self-insured, please provide documentation as to the reserves maintained for the payment of claims and for any stop-loss insurance carried by the Employer, including coverage terms and cost. In addition, please provide copies of contracts with all service providers including stop loss insurance, third party administrators, leased network providers, prescription benefits managers, care coordinators, etc.;

d. Documents showing or reflecting census data for the current and prior insurance contract year showing numbers of bargaining unit employees utilizing each of the plan options, and the same for nonbargaining unit employees covered by the plan;

e. Documents showing or reflecting the actuarial value of the plan in aggregate as well as by benefit class. (For example, the actuarial value of the medical office visit benefit, the actuarial value of the hospitalization benefit, etc.);

f. If available, please include documents showing or reflecting any Custom Group Experience Reporting or other experience reporting (annually and quarterly) during the current and prior 2 insurance contract years, showing the key utilization and cost indicators summary; group demographic summary; monitor reporting; top 20 (or more) diagnoses, procedures, prescriptions, therapeutic classes with codes, numbers of claimants, and total cost;

g. Documents showing or reflecting the date the insurance plan will be renegotiated with the insurance carrier or the third party administrator and any proposed changes;

h. Documents showing or reflecting all requests for proposals made and proposals received by the Employer and/or the Employer's consultant/broker from insurers and providers, other than those currently used by the plan, during the current and prior insurance plan year regarding health care coverage and insurance;

i. Documents showing or reflecting the dollar amounts of monthly administrative costs (including the definition of "administrative costs")during the current and prior 2 insurance contract years. In addition, please provide documents showing or reflecting these costs (a) as a share of the premium payments to the insurer (if fully insured) and (b)as a percent of the amount of claims paid;

j. All documents showing or reflecting any other costs incurred other than claims paid;

k. Documents showing or reflecting the financial impact of all changes that the employer is considering with respect to plan design and cost containment, including studies, reports, and actuarial analyses;

Hansen and Chinea testified that they told Respondent during negotiations that the Union wanted information regarding agency personnel (pars. 7 and 12 of the January 6 request) because agency employees cost more than the Respondent's own employees and it would be more cost effective to funnel that money into work and pay for unit employees. Chinea testified that the Union sought cost reports for reimbursement from Medicaid and other public programs (par. 16) because the Union wanted to know the Respondent's funding sources.

On January 26, 2016, Jasinski sent the Union some, but not of all, of the information it requested. The information requested in the above-quoted portions of the January 6 request was not provided by the Respondent on January 26, 2016.

On February 4, 2016, Chinea emailed Jasinski a letter which referenced and repeated the January 6 request for information.

On February 12, 2016, Jasinski emailed Chinea a letter indicating that the Union had already received the Respondent's response to the January 6 request. Jasinski did not state in this letter that the Respondent intended to provide additional outstanding information.

On March 10, 2016, the parties held their first bargaining session.[10] At this meeting, the Respondent proposed that the parties address noneconomic subjects before economic subjects. The Union agreed to start with economics. However, the Union indicated that economics might also need to be discussed because, in Chinea's opinion, economics and noneconomics were related.[11] The Union presented the Respondent with its multiemployer collective-bargaining agreement with the League of Voluntary Hospitals and Homes of New York. Chinea testified that the Union presented this agreement to the Respondent as an example of a standard contract.

On April 15, 2016, the following memorandum from Perucci to "All Staff" was posted on a bulletin board near the time clock:

> It has come to our attention that a few employees are conducting union business while on Putnam Ridge's time. This is not acceptable and will not be tolerated. Time at work is to be devoted to the care our residents.
>
> Union business should not be conducted on Putnam Ridge property or during work hours.
>
> Any continuation of this practice will result in discipline and possible termination. The individuals initiating or participating in this activity during work hours will face disciplinary action.
>
> I ask for your cooperation in this matter.
>
> Thanking you in advance.

McTighe and LPN Lorraine O'Conner testified that the Respondent, before posting this memorandum, never told employees what they could discuss at work. Rather, employees were free to talk about whatever they wanted.

On April 19, 2016, Chinea mailed Jasinski a letter that included an additional request for the following information (April 19 request): "[A]ll unit schedules of staffing levels - per shift/per unit for the past (4) four months. Please supply all information in electronic format (data base or spread sheet)." Chinea testified that the Union never received these documents from the Respondent. [Tr. 157]

At the June 1, 2016 bargaining session, the Respondent presented a proposal to the Union on noneconomic subjects.

On September 12, 2016, Chinea emailed Jasinski a comprehensive proposal with economic and noneconomic provisions. The Union's proposal included the following: a 6 percent wage increase effective each year of a 3-year contract; certain minimum hourly wage rates by classification with the lowest being $15 per hour (CNAs, maintenance, receptionists, unit secretaries, dietary, and housekeeping) and the highest being $30 per hour (LPNs); longevity pay of $1, $2, or $3 per hour for employees with 4, 8, and 10 years, respectively; shift differentials for shifts commencing before 6 a.m. or ending after 7 p.m.; 10 holidays and 3 personal days with pay for the day off plus any hours worked (pay at 1.5 times the hourly rate for hours worked on 8 "legal" holidays); vacation of 1 week after 6 months, 2 weeks after 1 year, 4 weeks after 5 years, and 5 weeks after 25 years; sick leave of 12 days during the first year, 13 days during the second year, and 15 beginning the third year; additional provisions for leaves of absence, maternity leave, paternity leave, bereavement leave, leave for marriage, leave for jury duty, and education leave; welfare and pension fund benefits with contributions of 28.05 percent and 11.7 percent of gross payroll, respectively; several other funds with total contributions of 1.75 percent of gross payroll; severance; and limits on the use of agency employees and subcontracting.

On October 7, 2016, Jasinski responded with a modified proposal that only addressed noneconomic provisions. The Respondent's proposal included provisions for a union shop, probationary period, no discrimination, union visitation, layoffs, grievance and arbitration, work-week, unpaid leave, checkoff, and management rights. Hansen testified on cross-examination that some of these types of provisions were important for a union to obtain, but she was not asked about the utility of the particular provisions proposed by the Respondent. Indeed, the proposal, as drafted by the Respondent, did not necessarily grant the Union and employees rights often contained in such provisions. For example, it is not clear that the Respondent's proposal protected employees from discipline, suspension or discharge without just cause.[12] The Respondent also provided that seniority would only prevail in layoffs if "past performance is equal as determined by the [Respondent]." On the other hand, the Respondent's proposal did appear to grant certain Union/employee rights and impose certain obligations on the Respondent.

On October 13, 2016, Chinea emailed Jasinski a letter identifying certain requested information that was still outstanding.

At the October 26, 2016 bargaining session, the Union demanded that the parties engage in negotiations concerning all provisions, including economics. The Respondent reluctantly agreed.

On November 28, 2016, the Respondent made the following economic proposal:

> Term: Five (5) years effective upon ratification
> Minimums: LPNs: $19.50
> CNAs: $13.00
> Activities Aide: $11.50
> Dietary Aide: $10.00
> Housekeeping Aide:$10.00
> Unit Secretary: $10.00

[10] By letters dated March 14 and April 19, 2016, the Union proposed March 29, 30, May 4, 11, or 18, 2016 as dates for a bargaining session after March 10, 2016. The parties did not meet on any of the dates proposed by the Union. The next bargaining session was held on June 1.

[11] Throughout the hearing, Jasinski referred to noneconomic issues as "terms and conditions."

[12] Hansen testified that she understood the Respondent's proposal on management rights to include a limitation on the Respondent's discretion to suspend or discharge employees without just cause. The management's rights clause states that the Respondent has the right to suspend or discharge employees "for just cause." Thus, the Union was not being asked to waive its right to bargain over certain suspensions and discharges. However, I do not see that the Respondent's proposal otherwise included a limitation on suspensions and discharges without cause. Jasinski did not testify whether he understood the Respondent's proposal to include such a limitation.

Maintenance Aide: $11.00
Office Clerical: $10.00

No-Frills Rate:[13]

LPNs:	$2.50 added to base rate.
CNAs, Maintenance:	$2.00 added to base rate.
Dietary, Housekeeping, Office:	$1.25 added to base rate.

Employees opt-in and opt-out once a year. Employee who participates in program waived all benefits including participation in health benefits plan, paid-time off.

Employer reserves the right to hire above the referenced minimums based on experience in the healthcare industry. Such decision shall not be subject to the grievance and arbitration procedure.

Increases:

Upon ratification: employees will receive one percent (1 percent) increase on the employee's anniversary.
After eighteen (18) months:one percent (1 percent) across the board.
After thirty (30) months:one percent (1 percent) across the board.
After forty-eight (48) months: one percent (1 percent) across the board.

In addition to general increase, Employer reserves the right to provide a merit increase to an eligible employee upon/his/her anniversary. Merit increase is discretionary and based on the employee's performance for the prior year.
Decision to grant or not to offer a merit increase is not subject to the grievance and arbitration procedure.
Holidays:
Upon completion of the probationary period, non-probationary employees will be entitled to seven (7) holidays per year. For all holidays, employees who work on the holiday will receive another day off with pay at their regular rate within thirty (30) days of the date of the holiday worked.

Employees will be scheduled to work alternate holidays.

Sick Days:
Upon completion of probationary period, employee will begin to be eligible for seven (7) days per year to accrue on a monthly basis. (7/12) per month.

Vacations:
After one (1) year of continuous employment:ten (10) days
After ten (10) years of continuous employment: fifteen (15) days
After twenty (20) years of continuous employment: twenty (20) days

Health Insurance:
Eligible employee contributions are as follows:
Plan A: Single Coverage: $53.00/per pay
Dependent Coverage: $160.00/per pay
Plan B: Single Coverage: $21.00/per pay
Dependent Coverage: $79.00/per pay

Eligible employees must be regularly scheduled and work thirty (30) hours per week to be eligible to participate in health insurance program.

Increased premium costs in health insurance during the term of the contract shall be paid 50 percent by the employee and 50 percent by the Employer. Employer reserves the right to change healthcare providers during the term of the contract. The Employer agrees to notify the Union thirty (30) days prior to the proposed change in healthcare provider and agrees to meet with the Union to discuss the proposed change of healthcare providers.

Employer Reserves the Right to Add to, Subbtract From or Modify the Terms of the Employer's Proposal.

In subsequent negotiations, Jasinski clarified that any current wages and benefits not specifically covered by the Respondent's proposals would be eliminated.

Payroll records indicate that most employees were already being paid an hourly wage that was greater than the minimum wage rates proposed by the Respondent. However, approximately 17 active employees in the positions of housekeeper, laundry aide and dietary aide were earning $9.70 per hour (i.e., less than the Respondent's proposed minimum rate of $10 per hour). About four additional employees in the same classifications were earning between $9.85 and $9.89 per hour. Thus, a total of about 21 employees would have been entitled to a wage increase under the Respondent's proposed minimum wage rates.

Jasinski described the parties' respective positions during negotiations regarding the Respondent's economic proposal as follows:

> Ms. Hansen spoke up that she felt that this was regressive bargaining; I think that was the term that she used. She stated that . . . we proposed less holidays than the employees previously received. She commented that the employer's proposal provided less of an increase than the employees previously received. My comment to Ms. Hansen was that this was negotiations. That there was no guarantee. That it's not what the employees currently have, but we're looking at a total and complete collective bargaining agreement. I also reminded the union . . . that [its] proposal amounted to at least a 70 percent increase in the costs of labor for this particular facility. And I reminded them . . . that the union's proposal was . . . all over the place. That they were asking for a pension. They were asking for health and welfare. They had a minimum of 15 dollars an hour. On top of that, the six percent increase in each year of the collective bargaining agreement. So it gave us a little idea in terms of where the union wanted to go with regards to getting an ultimate contract. So our proposal was in response to that.

On December 13, 2016, Jasinski emailed Chinea a letter enclosing the following information:

1. Updated list of gross payroll for 2016;
2. Date and amount of all wage increases from 2011;
3. Gross annual payroll for bargaining units for 2014 and 2015;
4. Number of overtime hours worked on a quarterly basis in 2014 and 2015;

[13] The no-frills rate is a rate of pay without benefits.

5. Cost of benefits and deductions as of December 2016;
6. Gross amount paid for health insurance in 2014, 2015, and 2016.

On December 14, 2016, Jasinski emailed Chinea the Respondent's 2014 cost report submitted for Medicaid reimbursements. [J 26] Jasinski did not explain in his cover letter why the cost reports for 2013 and 2015 were not provided. (See January 6 request # 16.)

On December 15, 2016, Jasinski emailed Chinea a letter stating that (1) "[t]he no frills rate for opting out of employer-paid health insurance coverage for LPN is an additional $2.50" and (2) "[t]he insurance plans are renewed in June of each year."

On December 20, 2016, Jasinski emailed Chinea the daily schedules for dates from December 1, 2014 to March 5, 2014. Jasinski did not state in his cover letter why additional outstanding schedules were withheld for the period March 6, 2014 to December 20, 2016. (See January 6 request #7.)

On January 6, 2017, Jasinski emailed Chinea a letter regarding merit wage increases, which stated as follows:

> Putnam Ridge proposes to provide wage increases for all eligible bargaining unit employees on their anniversary. We will continue to employ the prior practice of reviewing an employee on his/her anniversary and consider providing increases based on a number of factors, including but not limited to overall work performance for the previous year.
>
> This is not a guarantee of a wage increase for any employee. The range for wage increases will be from 0 - 1.75 percent. We are willing to meet and confer regarding these potential wage increases on the anniversary of each employee. Please advise.

Prior to this letter, the Respondent had not notified or offered to bargain with the Union regarding the range of wage increases associated with employee appraisal ratings.

During negotiations, the parties largely took turns modifying their respective proposals with neither side wanting to make two moves in a row and bargain against itself. By January 2017, the Union had modified its wage proposal to reduce its demand from three annual increases of 6 percent to a 6 percent increase the first two years of the contract and a 5.75 percent increase the third year. At the January 10, 2017 bargaining session, the Union asserted that it was the Respondent's "turn" to move. However, the Respondent refused to revise its proposal because, according to Jasinski, the Union's movement had been insufficient to date.

On April 3, 2017, Jasinski emailed Chinea a letter in which he confirmed the date of the next bargaining session (April 5, 2017) and asked whether any requested information was outstanding.

On April 5, 2017, Chinea emailed the following letter in response to Jasinski's April 3, 2017 correspondence:

> We look forward to negotiations this afternoon. With respect to the attached letter, I assume you meant that you are requesting a list of the information that the Union believes has not yet been provided. We will be prepared to itemize the missing information at bargaining today. However, the Employer should be well aware of what information is outstanding as it knows what information has been produced and because the Union has detailed the outstanding information at numerous bargaining session. In particular, the Union has notified the Employer of its outstanding request for a current run of gross payroll for bargaining unit employees (in an electronic sortable format), all information regarding agency use and expenses at the facility, and accurate and complete information related to the health insurance plans offered by the Employer—as set forth in the Union's information request. As I'm sure you remember, at the last session we asked numerous questions about the Employer's health insurance plans and the Employer was not able to answer to our questions. We hope and expect that the Employer will come today with documents responsive to our outstanding requests and will be prepared to discuss that information in detail.

During the April 5, 2017 bargaining session, Jasinski claimed that the Union's proposal, if accepted, would increase the Respondent's labor costs by over 70 percent. The Union asked how Jasinski arrived at this figure, but he did not say. After a caucus, Greenberger did not return because he had to leave early. The Union objected to his early departure. According to witnesses for the General Counsel, during this exchange, an employee told Jasinski not to talk to her like a shmuck. Jasinski claims, to the contrary, that the employee called him a "fucking shmuck." Jasinski packed up to leave and said he would not be subject to anti-Semitic comments. The employee stated that she, herself, was Jewish. More specifically, according to Chinea, the employee said, "I'm Jewish, you fucking moron."[14]

On April 7, 2017, a memorandum addressed to "Our staff" was posted near the time-clock and stated as follows [J 6]:[15]

> A number of our employees have brought to our attention that they have been subject to harassment and bullying by other employees. Employees are also spreading false rumors about us. This is happening in the work a reason working time. This is totally unacceptable and will not be tolerated by Administration.
>
> We have "zero" tolerance for any type of harassment in the workplace. We all have a difficult job and no one has the right to try to intimidate or harass our employees. We have never allowed this by anyone and we are not about to start now. If anyone feels that he/she is being gullied or threatened, please let us know and we will investigate and take appropriate action up to and including termination.
>
> Our facility has been a welcoming place where we have all worked together for everyone's benefit. We will not let anyone violate our employees and create a hostile work environment. Thanks to all of you for your hard work and dedication to our facility.

On April 7, 2017, Jasinski also emailed Chinea a letter with his account of events during the previous bargaining session. Jasinski stated in this letter, "We will never tolerate this type of

[14] I do not consider the different testimony regarding this incident to be significant and make no credibility findings regarding them.

[15] This memo was still posted on the time-clock bulletin board as of the trial in this matter.

behavior. Should it happen again, we will leave the meeting." Jasinski also repeated his claim that the Union's proposal would increase the Respondent's labor costs by more than 70 percent. [J 7]

On April 12, 2017, Hansen emailed Jasinski a letter with her account of events at the previous bargaining session and the following statement regarding outstanding information:

> If the Employer is interested in bargaining in good faith, it will provide the requested information without delay, review the Union's actual proposals, and come prepared to answer questions about relevant subject matters at the next session. While we will provide bargaining dates, it is clear that bargaining will not be productive until the Union has the information it requested, particularly with respect to agency usage and health insurance. We expect that all of the requested information will be provided without delay and by no later than April 21, 2017.

On April 18, 2017, Jasinski emailed Hansen a letter which contested her version of the April 5, 2017 bargaining session and purported to provide the details of his claim that the Union's proposal would increase the Respondent's labor cost by more than 70 percent. [J 9] With regard to the latter, Jasinski stated as follows:

> The Union's latest proposal showed little if any movement. In particular, I explained the proposed costs of the Union's proposal and provided you with a cost based on your proposal. I represented that it was approximately 70% increase in costs. I didn't believe it was necessary to break it down. You asked how I got to that number. This represents the increases:
>
> General increase: 6% each year;
> Increase minimums: 25% - 40%; This percentage is based on the different classifications;
> Longevity: 15% - 20%; This increase is based on years of service;
> PTO: 20%;
> Benefit Fund: 28.05%;
> Pension Fund: 11.7%;
> Education Fund: 0.5%;
> Job Security Fund: 0.25%;
> Worker Participation Fund: 0.25%;
> Child Care: 0.5%;
> Pension, Health, Legal: 0.5%; and
> Legal Services: $125.00 times the number of employees each year.
>
> Depending on the individual job classification, the Union's proposal is more than 70 percent increase. This figure does not include your proposals regarding terms and conditions which further adds to the costs of labor.

During subsequent bargaining sessions, the Union advised Jasinski that his calculation was unsubstantiated without a gross payroll showing the hours that employees actually accumulated and were paid. With such requested information, the Respondent's labor costs could be compared to a calculation of what the same hours would cost under the Union's proposal. Further, since the Union could not verify the actual cost of its proposal, it was reluctant to dramatically reduce its demands. At trial, Jasinski admitted that he did not actually calculate or know the specific dollar cost of the Union's proposal.

On April 19, 2017, Hansen emailed Jasinski a letter which asserted that the Respondent's April 7, 2017 memorandum was unlawful and demanded its "immediate rescission."

On April 25, 2017, Jasinski emailed Chinea "the most recent employee payroll information for bargaining unit personnel." Greenberger testified that he received this information from the Respondent's payroll company. The payroll information contained a list of employees with their IDs, job codes, status, standard hours per week, and hourly wage rates. In addition, the April 25, 2017 email contained certain information regarding employee medical insurance.

The parties subsequently exchanged correspondence regarding the next bargaining date with the Union proposing May 22, 23, June 2 or 8, 2017 and the Respondent proposing June 6, 15, or 20, 2017. An agreement was reached to meet on June 20, 2017. However, on June 13, 2017, the Respondent requested that negotiations be rescheduled because Jasinski had an upcoming trial. The Union proposed July 12–14, 2017 and the parties met to bargain on July 13, 2017.

By letters dated August 11 and 17, 2017, the Union proposed September 18–19, 2017 as dates for the next bargaining session. The Respondent did not respond to this request.

By email on September 11, 2017, Hansen requested that Jasinski provide a response to proposed bargaining dates and outstanding information, as follows:

> [A]s you know, the Union is still awaiting numerous documents requested in connection with the ongoing contract negotiations. In particular, the Union has repeatedly requested the information concerning agency use as set forth in the Union's January 6, 2016 information request. As we have discussed in detail at each of the last many bargaining sessions, agency usage is a major concern for the bargaining unit including the number of agency workers being used to perform bargaining unit work, the scheduling of those workers, the impact agency use has on the bargaining unit, and the amount of money the facility is willing to pay non-bargaining unit employees to perform bargaining unit work. The Employer has repeatedly stated that it would provide the requested information regarding agency use but, to date, the Union has received none of the requested information. Please provide the requested information without further delay.
>
> The Union also still awaits a response to its offered bargaining dates. Please respond without further delay.

On October 9, 2017, the Union proposed October 24–26 as dates for the next bargaining session. The Respondent did not respond.

On October 27, 2017, the Union proposed November 9 or 13 as dates for the next bargaining session.

With regard to the parties' failure to meet in September and October 2017, Jasinski testified as follows:

> Well, September is a difficult month because of the Jewish holidays. Eric Greenberger is an observing Jew and there are a number of holidays in the month of September and October. That makes it rather challenging for us to get negotiation dates.

> Mr. Chinea is also someone who's very busy with regard to contract negotiations as well. So it presented—it presented a challenge with regards to September and October.

On November 16, 2017, the Respondent notified the Union that Jasinski had been in a car accident on November 5, 2017 and spent 4 days hospitalized in the intensive care unit.[16] Accordingly, the Respondent requested a postponement of the trial in this case, which was then scheduled for December 6, 2017. Hansen agreed to an adjournment of the trial but demanded in exchange a bargaining date before the end of the year. The Respondent agreed to a bargaining date of December 21, 2017.

At the December 21, 2017 bargaining session, the Union proposed and the Respondent agreed to a subcommittee meeting dealing with health benefits. However, the Respondent had not agreed to a specific date for such a meeting as of the last day of trial, February 5, 2018.

The parties moved on their economic proposals throughout negotiations, but only to a limited degree.[17] The Union regularly complained about not receiving requested information and indicated that this impeded its ability to move in larger increments. Hansen and Chinea testified that, in particular, the Respondent's failure to provide gross payroll with actual hours and pay prevented the Union from costing its proposal and determining whether Jasinski was correct in his claim that the proposal would increase the labor costs by more than 70 percent. The Union also indicated throughout negotiations that it had "a lot of room to move on its" proposal but would not accept a proposal that was worse than terms and conditions the employees already had. Chinea testified that the parties were making adjustments and could be expected to "start high" and "meet in the middle," but "the interesting dynamic here . . . is that [the Respondent] would propose actually less than what they're currently giving [to employees]."

As of the trial, the Union had moved in its wage proposal from annual increases of 6 percent each year for 3 years to increases of 5 percent the first 2 years of the contract and 4.5 percent the third year. The Union also reduced its proposal for certain wage minimums. Meanwhile, the Respondent increased its wage proposal to a total of 6 percent (annual increments of 1 percent-1.5 percent) over the term of a 5-year contract. The Respondent also increased its proposed minimum wage for CNAs to $13.50 (which is the current minimum rate for CNAs).

A comparison of the Respondent's final proposal to a summary of current benefits the Respondent provided to the Union does reflect, as Jasinski admitted, that the Respondent was still proposing certain reductions in employee benefits in early-2018. The Respondent's proposal appears to seek the following concessions:

•Does not provide for continuation of $25,000 life insurance policy for full time employees.
• Does not provide for continuation of 401(k) plan with discretionary employer matching.
• Replaces double time for hours worked on a holiday with one day of compensatory leave.
•Does not provide for continuation of 3 days of bereavement leave.
• Reduces vacation: Proposes for all employees regardless of classification to receive 10 days of vacation after 1 year of service, 15 days of vacation after 10 years of service, and 20 days of vacation after 20 years of service. Conversely, all employees were currently receiving at least 3 weeks of vacation after 4 years of service. Further, all RNs received 4 weeks of vacation and certain other designated classifications received 4 weeks of vacation after 4 years.
• Does not provide for continuation of free counseling services.
•Does not provide for continuation of tuition reimbursement with reimbursement of 50%-100% (depending upon class grade) with a 2 year employment commitment.
• Does not provide for continuation of dental insurance.
• Does not provide for continuation of camp scholarship program with $1,500 reimbursement for each child (3 child cap) to attend day camp.
• Does not provide for continuation of college scholarship program with $1,000 reimbursement for each child (2 child cap) who attends college.
• Does not provide for continuation of "employee of the quarter" program for employee who is voted to receive $50 gift card and a parking space.
• Does not provide for continuation of recognition events during the week.
• Does not provided for PRIDE program with prizes for exceptional service.

Jasinski denied, at trial, that the Respondent's last proposal was less favorable than employees' current compensation. Although Jasinski admitted that the Respondent was proposing a reduction in certain individual benefits, he claimed that the Respondent made up the difference by offering better wages. Jasinski further testified as follows with regard to the Union's claim that the Respondent's last economic proposal was "regressive:"

> That was said at the bargaining table, and our response was everything was negotiable, that we had put out a package that was being negotiated, and . . . the union's proposal of 70 percent was so extreme from our perspective that . . . if we don't start at a particular level, that there are give and take, that there are no guarantees in negotiations, and that was our proposal. I believe I also said that that was not our final proposal as well. . . . I appreciated what Ms. Hansen and Mr. Chinea said with regards to that. We were, in some respects, proposing less than what the employees had before. But the complete package was more.

[16] Jasinski testified that he was actually in the ICU for 5 days with four fractured ribs, a fractured pelvic bone in two locations, and a lacerated spleen.

[17] After their initial written contract proposals, the parties exchanged counter proposals verbally. The parties' bargaining notes were not entered into evidence and the participants who testified did not recall exactly what moves were made or when.

The Respondent's final economic proposal was not necessarily worse than the merit wage increases employees received before 2016. As indicated above, the Respondent ultimately proposed annual increases in increments of 1 percent-1.5 percent totaling 6 percent over 5 years and reserved the right to continue granting merit wage increases on employees anniversaries. Thus, for example, Housekeeper Rosando Alama-Larreta, earning $10.84 per hour, received an evaluation of outstanding on March 6, 2017, which would have translated to a 2.5 percent increase of $0.27 under the pre-2016 merit wage formula. However, if Alama-Larreta received a 1 percent wage adjustment ($0.11) and a 1.75 percent merit increase ($0.19 under the Respondent's post-election formula) on a $10.84 per hour rate, she would have received a total wage increase of 2.75 percent or $0.30 per hour in 2017 (i.e., higher than the 2.5 percent increase she would have received before the Union was elected).[18]

Amendment of the Complaint with Regard to Overall Bad Faith Bargaining

The amended complaint alleged in paragraph 17(b) that the Respondent failed to meet with the Union at reasonable times between August 11, 2017 and early-December 2017. Paragraph 17(c) alleged that the Respondent by its overall conduct, as described in 17(b), failed and refused to bargain in good faith.

On the second day of trial, I asked the General Counsel to clarify whether the Region was alleging overall bad faith bargaining. However, the answer was not clear and I, therefore, allowed Respondent's counsel to conduct certain cross examination that might be relevant to a surface bargaining allegation.

The next day, I asked the General Counsel the same question, but still found the answer to be ambiguous. Accordingly, I again allowed the Respondent leeway on cross examination.

On the fourth day of trial, the General Counsel moved to amend paragraph 17 of the complaint to include an allegation that the Respondent engaged in overall bad faith bargaining by committing the other unfair labor practices alleged in the complaint and by insisting without explanation on proposals less favorable than what unit employees had before the election. In addition, the General Counsel moved to amend the remedy to include a bargaining schedule, a make whole remedy for employee negotiators, and reimbursement for Union bargaining expenses.

The General Counsel attempted to justify these amendments on the grounds that the Respondent's cross examination of Hansen revealed new information (and also made it apparent that Hansen had to be recalled for additional testimony). I rejected the contention that the cross-examination of Hansen justified the amendments since the Region had access to Hansen during the investigation and all the evidence it needed to determine the merits of a surface bargaining allegation. However, I allowed the amendments and additional testimony of Hansen on the grounds that there was little prejudice since the Respondent had at least a degree of prior notice of the allegation in the complaint and had been granted leeway in cross-examination regarding it. I allowed the General Counsel to recall Hansen and she proceeded to testify at regarding the parties' respective proposals throughout negotiations.

ANALYSIS AND CONCLUSIONS

April 15, 2016 Memorandum

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by, on April 15, 2016, posting an overbroad rule which prohibited employees from engaging in union business on company property or during work hours. I agree.

The April 15, 2016 memorandum does not implicate the Board's recent decision in *The Boeing Co.*, 365 NLRB No. 154 (2017) (*Boeing)* because the restriction was not "facially neutral." Rather, the Respondent posted a rule that "*explicitly* restricts activities protected by Section 7." *Lutheran Heritage Village Livonia*, 343 NLRB 646, 646, fn. 5 (2004) (*Lutheran*) (a rule prohibiting solicitation, which is not limited to working time, violates the Act because the rule explicitly prohibits employee activity that the Board has found to be protected). The Board has long held that rules are overbroad to the extent they ban Section 7 activity (1) on company property (since employees are entitled to engage in such activity on company property during breaks and other non-working time) and (2) during "working hours" (without clarifying that the restriction does not apply to non-working time). *UPMC, UPMC Presbyterian Shadyside*, 366 NLRB No. 142 (Aug. 6, 2018); *Hyundai America Shipping Agency*, 357 NLRB 860 (2011); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994); *Valley Special Needs Program, Inc.*, 314 NLRB 903, 913 (1994). The Respondent's April 15, 2016 memorandum ran afoul of these longstanding policies and violated Section 8(a)(1) of the Act.

April 7, 2017 Memorandum

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by, on April 7, 2017, in response to employees' protected union activity, posting rules which prohibited harassment and spreading false rumors. I do not agree and will dismiss the allegation.

The April 7, 2017 memorandum implicates the Board's recent decision in *Boeing*, 365 NLRB No. 154 (2017) because the restriction is facially neutral. Under *Lutheran*, 343 NLRB at 647, the Board explained that a facially neutral rule would violate the Act under the following circumstances:

> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Board in *Boeing*, 365 NLRB slip op. at p. 3, overruled the "reasonably construe" standard in the first prong of the *Lutheran* analysis and replaced it with the following balancing test:

> [W]hen evaluating a facially neutral policy, rule or handbook

[18] While I did not do this calculation for all the employees, the calculations I did do reflected that employees would have generally received total annual wage increases (contractual wage adjustment plus merit wage increase) about 0.25 percent higher than the old merit wage increases standing alone.

> provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1). [Citations omitted]

The *Boeing* Board went on to delineate the following three categories of employment policies under the new standard:

> • *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, [363 NLRB No. 162 (Apr. 13, 2016)] and other rules requiring employees to abide by basic standards of civility.
>
> • *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> • *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Boeing, 365 NLRB slip op. at p. 3–4.

Initially, I reject the General Counsel's contention that the April 7, 2017 memorandum violated the second prong of the *Lutheran* test (not overruled by *Boeing*) because it was promulgated in response to employees' union activity (i.e., arguing with Jasinski during the April 5, 2017 bargaining session). The memorandum opens by specifically stating that "employees have brought to our attention that they have been subject to harassment and bullying by other employees." It does not make reference to an employee's argument with Jasinski. Further, it is not particularly surprising that the Respondent issued such a memorandum shortly after meeting with labor counsel. Jasinski subsequently stated in a letter to Chinea regarding the April 5, 2017 altercation that the Respondent would "never tolerate this type of behavior," but indicated that its response would be to "leave the meeting." Jasinski did not reference the April 7, 2017 memorandum or indicate that employees would be subject to discipline if they again engaged in the conduct the Respondent was attributing to them at the previous bargaining session. Accordingly, I do not find it a fair or reasonable reading of the April 7, 2017 memorandum to conclude that it was posted in response to an altercation during negotiations. Evidence that employees subjectively interpreted the memorandum that way is irrelevant as the test to determine whether a rule violates the Act is an objective one. *Miami Systems Corp.*, 320 NLRB 71, fn. 4 (1995), enfd. in pert. part 111 F.3d 1284 (6th Cir. 1997).

The General Counsel does not contend and the record contains no evidence that rules in the April 7, 2017 memorandum were applied in such a way as to restrict the exercise of Section 7 rights. Accordingly, the memorandum was not unlawful under the third prong of the *Lutheran* test.

Finally, I do not agree with the General Counsel's contention that a prohibition against the spreading of false rumors is "unlawful as it prohibits false statements that are rumors when the Board has long found that even false statements made during employees discussions are protected."[19] (GC Brief p. 82) Applying the old "reasonably construe" test in *Lutheran*, the Board has refused to find unlawful a similar rule against "harmful gossip," which "Merriam-Webster's Dictionary (10th ed. 1999) defined as 'rumor or report of an intimate nature' or 'chatty talk.'" *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 861 (2011). The Board determined that a prohibition against such rumors would not be reasonably constructed by employees to prohibit Section 7 activity. Id. The memorandum at issue here is even less likely to encompass protected activity than the rule found lawful in *Hyundai* since "harmful gossip" could arguably encompass rumors that ultimately proved true. Given that the Board in *Hyundai* found a similar prohibition lawful under the old *Lutheran* standard, I find that the rule at issue here is a lawful category 1 restriction that the Respondent was entitled to maintain because, "when reasonably interpreted, [it] does not prohibit or interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB slip op. at p. 3.

Based upon the foregoing, I will dismiss the allegation that the April 7, 2017 memorandum violated Section 8(a)(1) of the Act.

Thomas Discharge

The General Counsel contends that the Respondent discharged Thomas by refusing to assign her per diem shifts because of her union activity. I agree.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), "the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity." *Baptista's Bakery, Inc.*, 352 NLRB 547, 549, fn. 6 (2008). The elements of the General Counsel's initial burden "are union or protected concerted

[19] Statements are not protected if they are maliciously false or stated with reckless disregard for the truth. See *Five Star Transportation, Inc.*, 349 NLRB 42, 46 (2007); *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006). However, inaccurate statements may be protected if they are not made with malice or recklessness. The General Counsel does not assert in its brief that the memorandum was overly broad to the extent it discussed the harassment of employees.

activity, employer knowledge of that activity, and union animus on the part of the employer." *Auto Nation, Inc.*, 360 NLRB 1298, 1301 (2014). Circumstantial evidence may be used by the General Counsel to meet its burden of showing employer knowledge and animus. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253–1254 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Such circumstantial evidence may include the timing of alleged discriminatory action, general knowledge of and animus toward employees' union activities, failure to follow past practice, disparate treatment of discriminatees, shifting or irrational explanations for the treatment of discriminatees, and other contemporaneous unfair labor practices. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (May 31, 2018); *Novato Healthcare Center*, 365 NLRB No. 137 (Sep. 29, 2017); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

The evidence indicates that Thomas was an active and open Union supporter during the 2012 organizing campaign who spoke up at the Respondent's antiunion meetings (attended by managers) and contested certain comments by the person holding those meeting. She was not often present at the facility during the Union's second organizing campaign in 2015. However, a few days to a week before the election, she did speak up at a meeting in which Pottinger asked employees to give the Respondent "another chance." Thomas challenged Pottinger by indicating that the Respondent had already been given a chance in 2012. Thus, the evidence indicates that Thomas engaged in protected union activity that the Respondent was aware of in 2012 and shortly before the election in 2015.

The timing strongly supports a finding that the Respondent stopped assigning Thomas per diem shifts because of her union activity. The day Thomas challenged Pottinger about giving the Respondent "another chance" was the last day Thomas worked at the facility. Thereafter, the Respondent did not offer Thomas another per diem assignment.

It is also particularly telling of the Respondent's discriminatory intent that Thomas was denied the opportunity to work on the day of the election, December 4, 2015. Thomas had never, previously, been denied a per diem assignment on a day she requested to work. Although Ferrero told Thomas the facility was fully staffed on December 4, 2015, the Respondent failed, without explanation, to produce subpoenaed records which could have substantiated (or undermined) this claim. In addition, Thomas testified that two employees told her the facility was understaffed with CNAs on December 4, 2015. As discussed in the fact section, I rely on this testimony and infer that the Respondent was not, as Ferrero claimed, fully staffed on the day of the election. *Shamrock Foods Co.*, 366 NLRBB No. 117, fn. 1 (Board Decision) and fn. 61 (ALJ Decision) quoting *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396–397 (2004) enfd. 156 F.Appx. 386 (2nd Cir. 2005). The Respondent's pretextual reason for denying Thomas work on December 4, 2015 suggests it wanted to prevent her, a known Union supporter, from voting. Such specifically targeted antiunion animus also strongly suggests that the Respondent ceased offering Thomas per diem assignments because of her union support and activity.

The Respondent's stated reason for terminating Thomas's per diem shifts (i.e., she failed to meet per diem requirements for working weekends and holidays) is equally pretextual.[20] The Respondent's employee handbook states that per diems must "work a minimum of one week-end a month (*if needed*)." (emphasis added.) The record did not establish that Thomas was asked to work weekends and/or holidays and failed to do so. Further, the Respondent did not produce daily schedules for 2015 which might have shown that she did not work certain weekends and holidays (even if there was no evidence that she declined such assignments). Those same daily schedules could also have shown whether other per diem CNAs failed to work weekends/holidays and, like or unlike Thomas, continued to receive per diem work. Accordingly, it is appropriate to infer that Thomas did work weekends/holidays or, even if she did not, she was treated disparately. *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124 (2018) (appropriate to draw adverse inference regarding disparate treatment where General Counsel could not secure subpoenaed personnel and payroll records). The Respondent also preferred to use per diem staff than agency employees but continued to use agency staff after it stopped assigning per diem shifts to Thomas. Further, Pottinger and Flood never had their meeting to address the alleged "problem" of per diems failing to work weekends and holidays (suggesting that this was not actually a problem at all). Here, the evidence failed, in rather dramatic fashion, to show that the Respondent had any legitimate non-discriminatory reason for ceasing the assignment of per diem shifts to Thomas the day of the election and thereafter.

Based upon the foregoing, I find that the General Counsel established a prima facie case that the Respondent effectively discharged Thomas by discontinuing her per diem shifts because of her union activity. Further, since the Respondent's stated reasons for discharging Thomas are pure pretext, there is no need to conduct a mixed-motive analysis to determine if the Respondent would have discharged her regardless of her union activities. *Parkview Lounge, LLC*, 366 NLRB No. 71 (2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014).

Reduction of Merit Wage Increases

Unilateral Change of Merit Wage Increases in Violation of Section 8(a)(5) of the Act

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its practice of granting employee wage increases in the range of 2 percent-2.5 percent depending upon the employee's appraisal rating. I agree.

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the "status quo" as it pertains to terms and

[20] The Respondent has alternatively asserted that Thomas voluntary stopped seeking per diem shifts. This is factually inaccurate. Thomas sought additional per diem shifts and was told that she would not be assigned any until Pottinger and Flood had a meeting regarding per diem requirements. Thomas followed up to determine the results of this meeting and whether she would be assigned additional shifts but was repeatedly told that the meeting had not occurred. It is clear that the Respondent stopped assigning Thomas per diem shifts even though she wanted to keep working.

conditions of employment without first giving the union notice and an opportunity to bargain. The status quo consists of the terms of employment in effect on the date of the election, including past practices that occur with "such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *E.I. Du Pont De Nemours*, 364 NLRB No. 113 (Aug. 26, 2016) (overruled on other grounds) quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). Such a practice must be one that is "automatic" or based on a fixed formula such as to be reasonably certain "as to timing and criteria." *State Farm Mutual Auto Insurance Co.*, 195 NLRB 871, 890 (1972); *Post-Tribune Co.*, 337 NLRB 1279, 1279–1281 (2002). In the seminal Supreme Court case on post-election unilateral changes, *NLRB v. Katz*, 369 U.S. 736, 756 (1962), an employer's unilateral merit wage increases were found unlawful for the following reason:

> The company, without notice to the union, granted merit increases to 20 employees out of the approximately 50 in the unit, the increases ranging between $2 and $10. This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of s 8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in effect, were a mere continuation of the status quo—differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does.

Recently, the Board noted that past practice has been relied upon in "*require[ing]* employers to act unilaterally—specifically, to provide wage increases and to do so without bargaining . . . ."[21] *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017) (emphasis in original) citing *Arc Bridges, Inc.*, 355 NLRB 1222 (2010); *Mission Foods*, 350 NLRB 336, 337 (2007); and *Central Maine Morning Sentinel*, 295 NLRB 376 (1989). In *Raytheon*, the Board addressed "what constitutes a 'change' requiring notice to the union and the opportunity for bargaining prior to implementation." *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). The Board concluded "that the [employer's] modifications in unit employee healthcare benefits in 2013 were a continuation of its past practice of making similar changes at the same time every year from 2001 through 2012." Id. Since ongoing healthcare benefit modifications did "not materially vary in kind or degree from the changes made in prior years," they did not constitute a "change" and could be made unilaterally.

Here, the Respondent maintained a long-standing past practice of granting annual merit wage increases in a manner that was based on a fixed formula. Appraisal ratings of good, very good, and outstanding resulted in merit wage increases of 2 percent, 2.25 percent, and 2.5 percent, respectively. These wage increases were effective (retroactively if necessary) as of the employee's anniversary with the company.

The Respondent does not deny that it had a practice of granting the formulaic merit wage increases described above. The Respondent merely defends on the grounds that the merit increases were suspended for 3 years by the prior owner (before 2010) and replaced in certain years (2013/2015) with higher wage adjustments not tied to a merit review. The Respondent's January 15, 2013 memorandum stated, in part, as follows:

> We instituted a policy to review all of our employees on an annual basis and provide merit increases. We realized that these increases were not enough, and failed to address the decisions by the prior ownership not to provide increases for three (3) years.

Likewise, in 2015, CNA wages were increased to a minimum of $13.50 per hour (a larger than normal wage adjustment) to make that classification more competitive with other healthcare institutions.

I do not find the facts relied upon by the Respondent to be exculpatory. That a prior owner suspended the merit wage increases for 3 years prior to 2010 does not change the fact that the policy was adopted by current ownership and in place for a long period of time. Further, the isolated wage adjustments in 2013 (all employees) and 2015 (just CNAs) do not reflect the absence of a unilateral "change." Such higher than usual wage increases to correct a perceived deficiency in the Respondent's competitiveness in attracting personnel does not alter the fact that it maintained as a baseline a far more regular and long-standing practice of granting merit wage increases upon a fixed formula tied to appraisal ratings. Certainly, the Respondent was not required to continue granting wage adjustments similar to the raises in 2013/2015 since those increases did not reflect a regular practice. However, as of December 2015, employees would reasonably conclude that the Respondent's practice of granting merit wage increases would continue and it was obligated to maintain this regular and consistent practice as part of the status quo.

The Respondent also contends that it lawfully implemented its January 6, 2017 proposal for the reduction of merit wage increases upon a good faith impasse. This argument fails as well. The Respondent implemented the change without first notifying and providing the Union an opportunity to bargain. It is well settled that an employer violates Section 8(a)(5) and (1) of the Act by implementing a change as a fait accompli before offering to bargain over it. *Allied Products Corp.*, 218 NLRB 1246 (1975) (unilateral suspension of merit review violated the Act despite subsequent bargaining over the subject). The Respondent thereby "obstruct[s] meaningful bargaining" and cannot remedially cure that obstruction by bargaining over the same subject after the fact. Id. See also *Michigan Consolidated Gas Co.*,

[21] The *Raytheon* Board observed that it "must exercise considerable care when interpreting *Katz*—where the Supreme Court described a past practice as a *defense* to an allegation that an employer's unilateral changes violate Sec. 8(a)(5)—to mean that Sec. 8(a)(5) imposes an obligation on employers to make unilateral changes, particularly since the Act [in Sec. 8(d)] explicitly states that the duty to bargain 'does not compel either party to agree to a proposal or require the making of a concession." Here, however, the Respondent changed a long static formula before making any proposal to change it. While I take note of *Raytheon's* warning and have contemplated the matter with considerable care, in my opinion, extent law demands the finding of a violation.

261 NLRB 555, 562 (1982). The Union rightfully refused to consider the Respondent's proposal change on the grounds that an unfair labor practice charge was pending regarding the change, which had already been unilaterally implemented. In this context, the Respondent could not reach good-faith impasse on the subject until it rescinded the unlawful change and posted a corrective notice to employees for a designated period of time.[22] See *Wayron, LLC*, 364 NLRB No. 60 (2016) (impasse not reached where employer engaged in unfair labor practices that substantially effected the course of bargaining and caused the deadlock).

Based on the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by reducing the merit wage increases of employees.

Discriminatory Reduction of Merit Wage Increases in Violation of Section 8(a)(3) of the Act

The General Counsel contends that the Respondent's reduction of merit wage increases violated Section 8(a)(3) and (1) of the Act as well as Section 8(a)(5) and (1). I agree.

The Respondent admits that it had no plans to reduce employee compensation until, over its opposition, employees elected the Union as their bargaining representative. In fact, the Respondent admits that, before the election, it was contemplating an increase in employee compensation. Nevertheless, shortly after the vote, the Respondent reduced its long-standing formula of providing merit wage increases in the range of 2 percent-2.5 percent to a range of 1.25 percent-1.75 percent. The Respondent has offered no reason other than the Union's election as an explanation for this change.[23] I find the timing of the Respondent's action, absent any alternative trigger or reason, sufficient to establish a prima facie case that the Respondent reduced employees' annual merit pay raises because they elected the Union as their bargaining representative. See *Dixie Broadcasting Co.*, 150 NLRB 1054, 1076 (1965).

In finding that the General Counsel established a prima facie case, I also rely on the Respondent's other contemporaneous unfair labor practices. The Respondent discharged a known union supporter and unlawfully restricted union business on company property or work hours. By these actions, the Respondent demonstrated animus toward employees' union activity and a willingness to obstruct and discriminate against them on that basis.

Interestingly, as discussed at greater length below in the section on alleged bad-faith bargaining, the Respondent's modification of its formula for merit wage increases would not necessarily (at least initially) have resulted in a reduction of employees' total wage increases *if* it were combined with the wage increases the Respondent proposed in contract negotiations. Thus, the Respondent proposed a 1 percent wage increase following contract ratification and reserved the right to continue granting merit wage increases. On March 6, 2017, for example, housekeeper Roanda Alama-Larretta received an evaluation of "outstanding" and a merit wage increase of $0.19 or 1.75 percent of $10.84 per hour. If Alma-Larretta also received a $0.11 (1 percent of $10.84 per hour) contractual wage adjustment in 2017 pursuant to the Respondent's proposal, her total increase for the year would have been $0.30 per hour or 2.75 percent. A total annual increase of 2.75 percent would have been higher than the $0.27 or 2.5 percent increase she would have received under the Respondent's old merit wage formula.

Accordingly, one might speculate that the Respondent adjusted its formula for granting merit pay increases in order to ensure that employees would continue to receive wage increases comparable to what they received in the past (not dramatically higher) *if* the Union accepted the Respondent's wage proposal.[24] However, speculation does not constitute a defense and I need not decide the Section 8(a)(3) case on the basis of a hypothetical. The Respondent offered no explanation, including this one, for changing the percentages of its merit pay increases shortly after employees voted for union representation. Having found a prima facie case, whether the allegation is analyzed under *Wright Line* or *Great Dane*, the Respondent failed to offer a satisfactory explanation why its conduct should be considered a valid business decision and/or not discriminatory.

Based upon the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by reducing its formula for providing annual merit wage increases because employees elected the Union as their bargaining representative.

Information Requests

The General Counsel contends that the Respondent violated

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[22] As a general rule, an employer is also forbidden from engaging in "piecemeal bargaining" by implementing an individual wage proposal in the context of bargaining for an initial contract without reaching overall contractual impasse. *T-Mobile USA, Inc.*, 365 NLRB No. 23 (Feb. 2, 2017) quoting *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) ("it is difficult to bargain, if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of negotiations"). See also *Winn-Dixie Stores*, 243 NLRB 972, 984 (1979). Conversely, an employer may be entitled to unilaterally implement an annual wage change upon impasse or the absence of a request to bargain if the change concerns "a discrete event, . . . that simply happen[ed] to occur contract negotiations [were] in progress . . . ." *TXU Electric Co.*, 343 NLRB 1404, 1405 (2004). I need not reach this issue because the Respondent proposed the change in question a year after it was implemented and during the pendency of an unfair labor practice regarding the same.

[23] I do not find it exculpatory that the Respondent gave one employee a merit wage increase of 2.5 percent after the election pursuant to the pre-2016 formula. The Respondent still implemented the change close in time to the election. It is much more telling of the Respondent's discriminatory intent that it contemplated an increase of employee compensation before the election and reduced merit wage increases after the election with no explanation or significant intervening event.

[24] In this hypothetical scenario, the Respondent still arguably implemented the change because employees unionized, but perhaps did so less as a vehicle for punishing employees and more as a way to maintain comparable wages in anticipation of a prospective contract. If the Respondent had articulated this explanation, the proper standard for evaluating it might be *Great Dane Trailers*, 388 U.S. 26, 33–34 (1967) instead of *Wright Line* (i.e., to what extent the Respondent's action had an impact on Section 7 rights and, if comparatively slight, whether the Respondent had a "legitimate and substantial business justification" for it). However, the Respondent has not articulated, in this case, a business justification for its conduct.

Section 8(a)(5) and (1) of the Act by refusing to furnish certain information and unreasonably denying the production of other information. More specifically, the General Counsel contends that the Respondent failed to produce information in response to the April 19 request and paragraphs 1, 2(i), 3, 6–8 (in part), 9, 10, 12, 16, and 17(b) through (k) of the January 6 request. The general Counsel further contends that the Respondent unreasonably delayed the production of information in response to paragraphs 2(d), 2(f), 3, 5–8, and 17(a) of the January 6 request.[25] I agree with the bulk of the General Counsel's contentions, except paragraph 16 of the January 16 request.

An employer must provide requested information that is "presumptively relevant" to the union's performance of its role as collective-bargaining representative where the union seeks information concerning wages, hours, and other terms and conditions of employment of unit employees. *Southern California Gas Co.*, 342 NLRB 613, 614 (2004). Conversely, a request for information pertaining to matters outside the bargaining unit is not presumptively relevant and relevance must be established by the requesting party. However, even where the requested information is not presumptively relevant, the burden to show relevance is not exceptionally heavy. Rather, the Board has adopted a liberal discovery-type standard. *Columbia College Chicago*, 363 NLRB No. 154 (2016); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982) enfd. 715 F.2d 473 (9th Cir. 1983); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

The Respondent does not deny that it failed to produce certain information or that it delayed the production of other information for nearly a year after it was requested. The Respondent also failed to offer any explanation or excuse for the same. The Respondent merely contends that it produced some information and the Union was able to make comprehensive proposals without the rest. However, neither fact constitutes a legal defense. It is well settled that an employer does not satisfy its obligation to furnish all relevant information by providing some. *Marathon Petroleum Co.*, 366 NLRB No. 125 (2018). Further, that the Union did its best to negotiate in the absence of relevant information does not mean it was unhampered in doing so. Hansen and Chinea both testified, and advised Jasinski during negotiations, that the Union was impeded in its ability to move farther in its proposals because the Respondent failed to furnish information (such as payroll information which would have allowed the Union to evaluate the Respondent's claim that the Union's proposal would increase labor costs by more than 70 percent). See *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557 (2006) (Union's request for the hard costs of labor and benefits was relevant to its ability to assess employer's assertion that such costs constituted 40 percent of its labor costs).

The vast majority of the information requested by the Union on January 6 and April 19, 2016 was presumptively relevant as it pertained to the wages, hours, and other terms and conditions of employment of unit employees. Paragraphs 7 and 12 of the January 6 request and, in part, the April 19, 2016 request concerned the Respondent's use of non-unit agency employees. Chinea and Hansen testified that the Union sought information regarding the Respondent's use of agency employees to determine whether and to what extent that money could be funneled into increased work and pay for unit employees.[26] The Board has often found such reasoning to be a sound basis for ordering production of information of the type the Union sought in this case. See e.g., *Castle Hill Health Care Center*, 355 NLRB 1156, 1182 (2010).

Paragraph 16 of the January 6 request sought cost reports for reimbursement from Medicaid or any other public entity or program for the years 2013, 2014, and 2015. The Respondent provided the Union with the 2014 Medicaid cost report but did not provide the reports for 2013 and 2015. Such reports constitute financial information and, as such, are not presumptively relevant. *STB Investors, Ltd.*, 326 NLRB 1465, fn. 2 (1998) citing *Dexter Fastener Technologies*, 321 NLRB 612, 613, fn. 2 (1996). Unions have successfully demonstrated the relevance of cost reports for Medicaid reimbursement when employers have made "statements during negotiations regarding the need for layoffs to remain financially healthy or the uncertainty about their sources of revenues." *STB Investors, Ltd.*, 326 NLRB 1465, fn. 2 (1998) citing *Taylor Hospital*, 317 NLRB 991 (1995) and *Orthodox Jewish Home for the Aged*, 314 NLRB 1006 (1994). Here, however, the Union made no showing of relevance associated with the substance of negotiations. Rather, its interest in the Respondent's funding sources has not been justified beyond mere curiosity. Accordingly, I will not order the Respondent to produce cost reports it has not already provided to the Union.

Based upon the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide information in response to the April 19 request and paragraphs 1, 2(i), 3, 6–8 (in part), 9, 10, 12, and 17(b) through (k) of the January 6 request. I also find that the Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying the production of information in response to paragraphs 2(d), 2(f), 5–8, and 17(a)of the January 6 request. I do not find that the Respondent unlawfully refused to produce documents in response to paragraph 16 of the January 6 request.

Refusal to Meet and Bargain at Reasonable Times

The General Counsel contends that the Respondent failed to meet with the Union at reasonable times from August 11, 2017 to December 2017. I agree, in part, as discussed below.

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[25] The amended complaint alleged that the Respondent merely delayed the production of information in response to paragraphs 6–8 of the January 6 request, and did not allege that the Respondent failed to produce some of the information altogether. In its post-hearing brief, the General Counsel moved to amend the complaint to include an allegation that certain information was not produced in response to paragraphs 6–8. I grant the General Counsel's motion as the Respondent's response (or lack thereof) to the January 6 request was fully litigated and the issue (i.e., whether certain information was not produced at all) is closely connected to the allegation that the production of information was unreasonably delayed. See *General Drivers, Warehousemen & Helpers*, 365 NLRB No. 115 (Dec. 15, 2017) citing *Graymont PA, Inc.*, 364 NLRB No. 37, slip op. 1, 6–7 (2016), enf. denied on other grounds Nos. 16-1249 & 16-1288 (D.C. Cir. March 3, 2017), and *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989).

[26] As noted above, the Respondent admits that it is more cost effective to use its own employees than agency employees.

Jasinski was in a severe car accident on November 5, 2017 and hospitalized in the intensive care for 5 days with multiple broken bones and a lacerated spleen. Nevertheless, he scheduled and attended a bargaining session on December 21, 2017. Therefore, I reject the General Counsel's contention that there was an unexcused delay in negotiations from November 5 to December 21, 2017.

Between August 11 and October 27, 2017, the Union emailed the Respondent five times proposing bargaining dates on September 18-19, October 24–26, November 9, and November 13, 2017. The Respondent did not respond until November 16, 2017, when it notified the Union of Jasinski's car accident. Jasinski attributed the parties' failure to meet in September and October to Jewish holidays (since Greenberger is religiously observant) and the busy work schedules of the negotiators (Jasinski and Chinea). However, the Respondent did not provide any specific examples of work conflicts and I take administrative notice that none of the Union's proposed dates fell on Jewish holidays. See *Williams v. Weaver*, 2006 WL 2794417, at *5 (N.D.N.Y. Sept. 26, 2006) (appropriate to take judicial notice of holidays, including two Islamic holidays in 2003) (citations omitted). Of course, even if the parties did have certain work conflicts, it would not explain the Respondent's failure to respond to the Union's letters and proposed dates. The Respondent's failure for 3 months to respond to the Union's requests for bargaining dates in September and October is sufficient to warrant a finding that the Respondent unlawfully failed to meet with the Union at reasonable times during this period. See *McCarthy Construction Co.*, 355 NLRB 50 (2010) adopted by three-member panel in 355 NLRB 465 (2010) (employer unlawfully failed to respond to union's request for bargaining dates for 2-1/2 months).

Based upon the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to meet with the Union at reasonable times between August 11 and November 4, 2017.

Overall Bad-Faith Bargaining

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in overall bad faith surface bargaining. I do not agree and will dismiss the allegation. Since I do not find a violation on the merits, I need not address the Respondent's procedural contention that the General Counsel should not have been allowed to amend the complaint at trial to include the allegation.

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." "Good-faith bargaining presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract'" while surface bargaining presupposes a desire to do the opposite. *George Warehouse*, 349 NLRB 870, 871 (2007). "A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." Id. quoting *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Thus, the Board does not restrict a party from "engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Id. quoting *Public Service Co.*, 334 NLRB 487, 487 (2001). The Board examines "the totality of the employer's conduct" in determining whether it has demonstrated overall bad faith and engaged in surface barging. *Logemann Brothers Co.*, 298 NLRB 1018, 1020 (1990).

The Board has held that the presentation of predictably unacceptable proposals without reasonable justification suggests bad faith. Thus, the "'failure to define, explain or advocate [a] position' during bargaining should be considered as evidence of a party's lack of good faith." *Apogee Retail, NY, LLC*, 363 NLRB No. 122, fn. 3 (2016) quoting *Blue Jeans Corp.*, 177 NLRB 198, 206 (1969) enfd. sub nom. However, the absence of an explanation for a party's position will not establish surface bargaining where the party's failure to communicate and overall conduct do not establish an intention to frustrate agreement. Id.

Contrary to the assertion of the General Counsel, I do not find that the Respondent necessarily proposed to reduce the wages of employees. As noted above, a combination of the Respondent's contractual wage adjustments and its modified practice of granting merit wage increases (0 percent-1.75 percent) would not constitute a wage reduction.[27] Rather, employees would generally receive, in total, slightly higher increases (about 0.25 percent higher) than they would otherwise have received under the pre-2016 formula for merit wage increases (0 percent-2.5 percent). Further, the Respondent's proposal of certain wage increases not tied to discretionary appraisals has the advantage of ensuring that all unit employees receive, at least, a 1 percent-1.5 percent increase (depending on the year) even if their appraisal ratings are below "good." Finally, about 21 housekeepers, laundry aides, and dietary aides would receive wage increases under to the Respondent's proposed minimum rates.

It is also unclear to me whether the Respondent's proposal, if accepted as a package, would leave employees worse off than they were before unionizing. First, the noneconomic items proposed by the Respondent did have some (admittedly unquantifiable) value. It would certainly be of significant value to employees if Hansen was correct in her belief that the Respondent's proposal prohibited suspensions and discharges without just cause. Second, while the Respondent admittedly proposed a reduction in certain benefits, it is not clear whether those reductions would be offset by the potential for wage increases. The General Counsel and Union might argue that the Respondent's failure to produce subpoenaed records and information during negotiations effectively limited their ability to cost the Respondent's proposals. However, neither the General Counsel nor the Union attempted to establish that the Respondent's economic proposal would

[27] The General Counsel and Union seem to assume that the merit wage increases would be eliminated. While the Respondent's proposal did indicate that merit wage increases would be discretionary, they were always discretionary (pre-election) and given anyway. Further, on the two occasions in 2013 and 2015 when wage adjustments were given in lieu of merit wage increases, the wage adjustments were significantly higher than the standard merit wage increases.

result in a net economic loss with the information that was available to them and requests for adverse inferences. Rather, the General Counsel and Union merely listed the proposals which were worse than current terms and included, incorrectly in my opinion, the wage proposal discussed above.

Finally, and perhaps most importantly, I do not believe the Respondent's proposals could be considered a significant indicia of surface bargaining even if it was determined to be worse than employees' current terms and conditions of employment. I understood Jasinski to explain that the Respondent felt compelled to start low in its proposal because the Union started so high in its demands. Chinea testified that it is not uncommon for bargaining parties to start with extreme positions and meet in the middle. Chinea found it peculiar that the Respondent would start with a less favorable proposal than employees' current terms, but one would actually expect an employer to start below current terms if it was that party's intent to work up to (and maintain) its current labor costs. As noted above, it is not unlawful for an employer to attempt to maintain its current structure of compensation if it has the bargaining power to do so. *George Warehouse*, 349 NLRB 870, 871 (2007).

Admittedly, the situation here suggests a potential oddity in negotiations. Although not necessarily proved to my satisfaction, the Respondent may have proposed an economic package that was worse than the employees' current compensation even though the Respondent itself, to remain competitive, was contemplating an increase in compensation before the election. Thus, the Respondent arguably presented a proposal that it—much less the Union and employees—did not want to be implemented. However, this is not necessarily inconsistent with a strategy of pursuing what would ultimately be a final agreement in between the parties' initial proposals. Neither party declared impasse and both parties indicated an ability to move farther on their proposals. They were just very slow in doing so.

In failing to find a violation of surface bargaining, I do not mean to suggest that the Respondent's conduct did not adversely impact the Union's ability to bargain effectively. The Respondent refused to produce, for example, information that might have undercut its claim that the Union's proposal was expensive or show that resources were available to be moved from agency employees to unit employees. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (2018). The Respondent's discharge of a Union supporter could intimidate employees and undermine employee solidarity in support of the Union, including their willingness to strike. *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 880 (3d Cir. 1990). The Respondent's unilateral reduction of its merit wage formula could cause employees to view the Union as weak and undermine the Union's position as the stake holder in defending a benefit already in place (a position particularly useful if negotiations, as here, are protracted). *Pye v. Longy School of Music*, 759 F. Supp. 2d 153, 168 (D. Mass. 2011). The Respondent's delay in bargaining could also cause employees to grow frustrated and impatient in their willingness to stand firm for a favorable contract. *Amory Garment Co., Inc.*, 80 NLRB 182, 193 (1948). In sum, it is entirely possible that the Respondent purposely pursued an unlawful strategy of seeking a more favorable agreement than it might otherwise obtain if it played by the rules.[28] However, it is far less clear to me and not established by a preponderance of the evidence that the Respondent sought to avoid reaching a contract and, therefore, engaged in overall bad faith bargaining.

In my opinion, this case does not have a decisive factual basis for finding that the Respondent did not intend to reach agreement. Regressive bargaining in which an employer retreats from proposals when the parties are getting close to agreement is particularly suggestive of bad faith since it shows a specific intent to evade a contract. See e.g., *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (2018). Proposals that a union waive its right to bargain over key terms during the life of the contract are particularly suggestive of bad faith since it would require the union "to cede substantially all of its representational function, and would have so damaged the Union's ability to function as the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining." Id. quoting *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 489 (2001). The General Counsel and Union believe that the Respondent's proposals were so predictably objectionable as be a similar lynch pin in the finding of overall bad faith, but I am not convinced for the reasons stated above.[29]

CONCLUSIONS OF LAW

1. The Respondent, Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The following bargaining unit of the Respondent's employees is appropriate:

> Included: All full-time and regular part-time employees, including LPNs, CNAs, receptionists, unit secretaries, dietary aides, housekeeping aides, rehab aides, rehab techs, restorative aides, laundry aides, maintenance workers, activities leads/aides, and hospitality aides, including those per diem employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election
>
> Excluded: All other employees, all employees in the therapy department, RNs, cooks, professional employees, office clerical employees, guards and supervisors as defined in the Act.

3. The Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act by promulgating and maintaining an overly broad rule prohibiting employees from

[28] While an argument can be made that such a strategy should be considered overall bad faith bargaining, I have not found support for the same in Board precedent.

[29] The Union claims the Respondent delayed bargaining over economics and this suggests bad faith. I do not agree with the Union's factual assertion. The parties agreed to start with noneconomic subjects and the Union did not present economic proposals for this particular facility until September 12, 2016. The Union demanded bargaining over economics in about October 2016 and the Respondent agreed. The Respondent submitted economic proposals the following month. The Union also claims that the Respondent refused to "bargain altogether" by not moving from its previous proposal during the January 10, 2017 bargaining session. However, the failure to move does not equate to a failure to bargain.

engaging in union business on company property or during work hours.

4. The Respondent engaged in the following unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act:

(a) Discharging Catherine Thomas by ceasing to assign her per diem shifts because of her union activity.

(b) Reducing the merit wage increases of employees because they elected the Union, 1199 SEIU United Healthcare Workers East, as their exclusive collective-bargaining representative.

5. The Respondent engaged in the following unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act:

(a) Unilaterally reducing the annual merit wage increases of unit employees without first notifying and offering to bargain with the Union.

(b) Failing to provide the Union with requested information that is relevant and necessary to conduct negotiations or otherwise perform its duties as the exclusive collective-bargaining representative of unit employees.

(c) Unreasonably delaying the production to the Union of requested information that is relevant and necessary to conduct negotiations or otherwise perform its duties as the exclusive collective-bargaining representative of unit employees.

(d) Failing to meet and bargain with the Union at reasonable times.

6. The unfair labor practices committed by the Respondent affect Commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not otherwise violated the Act by promulgating and maintaining a rule against harassment and spreading false rumors, failing to produce cost reports for reimbursement from Medicaid, and engaging in overall bad faith surface bargaining.

REMEDY

Having found that the Respondents has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged and ceased assigning per diem shifts to Catherine Thomas, must offer her reinstatement to her former job or if her job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges enjoyed.

The Respondent shall make Thomas whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Scoopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Thomas for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent shall make employees whole for loss of earnings or other benefits suffered as a result of the unilateral and discriminatory reduction of their annual merit wage increases. This backpay shall be calculated in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), instead of *F.W. Woolworth Co*., 90 NLRB 289 (1950), with daily compounded interest. See *Community Health Services, Inc.*, 361 NLRB 333 (2014) (interim earnings should not be deducted in applying the *Ogle Protection Service* backpay formula when the employment of employees is not severed). The Respondent will also be ordered to rescind its new formula for proving annual merit wage increases and reinstate the old formula.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate employees for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 2 a report allocating employees' backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent will be required to remove from its files any reference to the unlawful discharge of Thomas and notify her in writing that her unlawful discharge will not be used against her in any way.

The Respondent will be required to rescind the rule prohibiting employees from engaging in union business on company time or during work hours.

The Respondent shall be ordered to post the notice attached hereto as "Appendix."

I will not impose the extraordinary remedies of a bargaining schedule, bargaining expenses, and/or a make whole remedy for negotiators. In *Unbelievable, Inc.,* 318 NLRB 857, 859 (1995), the Board confirmed that it will rely on standard bargaining orders "to remedy the vast majority of bad-faith bargaining violations" as "such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations." However, an employer's dilatory tactics may require as part of the remedy a bargaining schedule for the parties to meet and bargaining on a regular and timely basis. *UPS Supply Chain Solutions*, *Inc.*, 366 NLRB No. 111 (2108). Further, an order may require the reimbursement of union negotiation expenses "[i]n cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effect cannot be eliminated by the application of standard remedies[.]'" *Id.* quoting *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 614 (1969). In *Monmouth Care Center*, 354 NLRB 11, 69 (2009) adopted by three-member panel in 356 NLRB 152 (2010), the Judge observed that negotiation expenses were not appropriate since "there is no surface bargaining allegation . . . ."

Given that I have found no merit to the surface bargaining allegation, I will not order the Respondent to pay bargaining expenses, including a make whole remedy for employee negotiators. Although the Respondent committed serious unfair labor practices, they were not so aggravated or egregious as to warrant an order of bargaining expenses under current law. See *Monmouth Care Center*, 354 NLRB 11, 69 (2009).

Likewise, I will not include in my order a bargaining schedule. See *Universal Fuel, Inc.*, 358 NLRB 1504 (2012); *McCarthy Construction Co.*, 355 NLRB 50, 52 (2010) adopted by three-member panel in 355 NLRB 365 (2010); *Leavenworth Times*, 234 NLRB 649, fn. 2 (1978). The parties met 13 times to bargain on a near monthly basis. The Respondent did violate the Act by failing to respond to the Union's proposals of dates in September/October 2017, but subsequently met with the Union on December 21, 2017 (not long after Jasinski was injured in a serious car accident). Further, in my opinion, "the Union could have been more assertive in urging [the Respondent] to meet on a . . . more frequent basis." *McCarthy Construction Co.*, 355 NLRB at 53. The Respondent did engage a dilatory tactic by failing to produce certain information at all and failing to produce other information on a timely basis. However, the Respondent will be ordered to promptly produce all outstanding information and it is not clear that the failure to produce information kept the parties from the bargaining table. Rather, it impeded the parties' ability to move and be productive once they were there. Accordingly, based upon the foregoing, I will not order the bargaining schedule requested by the General Counsel.

I will order a *Mar-Jac* remedy requiring the Respondent to extend and honor the Union's certification for an additional period of 1 year. *McCarthy Construction Co.*, 355 NLRB at 53 citing *Mar-Jac Poultry Co.*, 136 NLRB 785, 786 (1962). Although the Board reduced the Judge's *Mar-Jac* remedy in *McCarthy* from 12 to 9 months, the unfair labor practices at issue here are more severe and, in particular, the Respondent's failure to furnish information (most of which is still outstanding) posed a greater impediment to fruitful negotiations. See *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home, Brewster, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, ceasing the assignment of per diem shifts, reducing the merit wage increases, and/or otherwise discriminating against employees for engaging in protected union activity or electing the Union, 1199 SEIU United Healthcare Workers East, or any other union, as their exclusive collective-bargaining representative.

(b) Unilaterally reducing the merit wage increases of unit employees without first notifying and offering to bargain with the Union. The appropriate bargaining unit consists of the following employees:

> Included: All full-time and regular part-time employees, including LPNs, CNAs, receptionists, unit secretaries, dietary aides, housekeeping aides, rehab aides, rehab techs, restorative aides, laundry aides, maintenance workers, activities leads/aides, and hospitality aides, including those per diem employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election
>
> Excluded: All other employees, all employees in the therapy department, RNs, cooks, professional employees, office clerical employees, guards and supervisors as defined in the Act.

(c) Failing to bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees by failing to meet and bargain with the Union at reasonable times.

(d) Failing to bargain in good faith with the Union by failing to produce and delaying the production of requested information that is relevant and necessary to the Union's functioning as the exclusive collective-bargaining representative of unit employees.

(e) Promulgating and maintaining an overly broad rule which prohibits employees from engaging in union business on company property or during work hours.

(f) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its overly broad rule, promulgated on April 15, 2016, prohibiting employees from engaging in union business on company property or during work hours.

(b) Rescind the changes made to unit employees' annual merit wage increases and reinstate the old formula for granting such merit wage increases.

(c) Upon the Union's request, bargain in good-faith with the Union at reasonable times as the exclusive collective-bargaining representative of employees in the bargaining unit.

(d) Furnish to the Union in a prompt and timely manner the information requested by the Union on January 6 and April 19, 2016, with the exception of cost reports for reimbursement from Medicaid or any other public entity or program for the years 2013 and 2015.

(e) Within 14 days from the date of this Order, offer Thomas reinstatement to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(f) Make Thomas whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(g) Compensate Thomas for search-for-work and interim employment expenses in the manner set forth in the remedy section of this decision.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Thomas, and within 3 days thereafter, notify Thomas in writing that this has been done and the discharge will not be used against her in any way.

(i) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral and discriminatory reduction of their annual merit wage increases in the manner set forth in the remedy section of this decision.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Brewster, New York facility copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed, or are otherwise prevented from posting the notice at the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 4, 2016.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges that the Respondent unlawfully promulgated and maintained a rule against harassment and spreading false rumors, failed to produce to the Union the cost reports for reimbursement from Medicaid, engaged in overall bad faith surface bargaining, or other allegations not specifically found herein.

Dated, Washington, D.C. December 12, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you or cease assigning you per diem shifts because you engaged in union activities.

WE WILL NOT reduce your annual merit wage increases because you elected 1199 SEIU United Healthcare Workers East (Union) or any other union as your exclusive collective-bargaining representative.

WE WILL NOT unilaterally reduce your annual merit wage increases, or any other terms and conditions of your employment, without first notifying and offering to bargain with the Union as the exclusive collective-bargaining representative of bargaining unit employees. The appropriate bargaining unit consists of the following employees:

> Included: All full-time and regular part-time employees, including LPNs, CNAs, receptionists, unit secretaries, dietary aides, housekeeping aides, rehab aides, rehab techs, restorative aides, laundry aides, maintenance workers, activities leads/aides, and hospitality aides, including those per diem employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election
>
> Excluded: All other employees, all employees in the therapy department, RNs, cooks, professional employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail to bargain in good faith with the Union by failing to furnish certain information and delaying the production of other information that was requested by the Union and was relevant and necessary to the Union's performance of its function as your exclusive collective-bargaining representative.

WE WILL NOT fail to bargain in good faith with the Union as your exclusive collective-bargaining representative by failing to meet and bargain with the Union at reasonable times.

WE WILL NOT promulgate and maintain an overly broad rule prohibiting you from engaging in union business on company property or during work hours.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly rescind the overly broad rule prohibiting you from engaging in union business on company property or during work hours.

WE WILL promptly rescind the changes made to unit

[31] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees' annual merit wage increases and reinstate the old formula for granting such merit wage increases.

WE WILL upon the Union's request, bargain with the Union at reasonable times as your exclusive collective-bargaining representative.

WE WILL furnish to the Union in a prompt and timely manner the outstanding information requested by the Union on January 6 and April 19, 2016, with the exception of cost reports for reimbursement from Medicaid or any other public entity or program for the years 2013 and 2015.

WE WILL, within 14 days from the date of this Order, offer Catherine Thomas full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL make all unit employees whole for any loss of earnings and other benefits resulting from the reduction of their annual wage increases.

WE WILL compensate any employee receiving a backpay award for the adverse tax consequences, if any, of receiving a lump-sum backpay award and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Thomas and WE WILL, within three days thereafter, notify her in writing that this has been done and that her discharge will not be used against her in any way.

ATLANTICAE MANAGEMENT LLC D/B/A PUTNAM RIDGE NURSING HOME

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-177329 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.